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IN THE

Supreme Court of the United States

October Term, 1968

FREDERICK T. ZUBER, *ET AL.*,
Petitioners,

v.

RUSSELL ALLEN, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

BRIEF FOR RESPONDENTS RUSSELL ALLEN, *ET AL.*, IN OPPOSITION TO BRIEF AMICUS CURIAE OF ATTORNEY GENERAL OF THE STATE OF CONNECTICUT

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IN THE

Supreme Court of the United States

October Term, 1968

No. 861

FREDERICK T. ZUBER, *ET AL.*,
Petitioners,

v.

RUSSELL ALLEN, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS RUSSELL ALLEN, *ET AL.*, IN OPPOSITION TO BRIEF AMICUS CURIAE OF ATTORNEY GENERAL OF THE STATE OF CONNECTICUT

OPINION BELOW

The opinion of the Court of Appeals is reported at 402 F.2d 660.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether, under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*, the Secretary of Agriculture was authorized to include in the Massachusetts-Rhode Island milk order of October 1, 1964, a nearby farm location differential provision 7 C.F.R. 1001.72, under which producers whose farms are located in either of two designated "nearby" areas are entitled to receive a differential payment which varies the uniform price required under Sec. 8c(5)(B)(ii) in recognition of (1) the use made of nearby producers' milk or (2) the allegedly higher prices received by nearby producers prior to Federal regulation, the aforesaid section providing that all producers are to receive a uniform price for all of their milk irrespective of the use thereof.

2. Whether the nearby differential provision promulgated on October 1, 1964, is an authorized adjustment to the uniform price, either under Sec. 8c(5)(B)(ii)(c) concerning "the locations at which delivery of such milk is made", or under (a) relating to "market * * * differentials customarily applied by the *handlers*", when such payments are made by "non-nearby" dairy farmers regularly supplying the fluid milk market to other producers whose farms are located in certain designated "nearby" areas, and when the "nearby" producers are already compensated for any location value of their milk under the zone differential of the milk order, 7 C.F.R. 1001.62, which includes an additional payment over the uniform price and includes (1) the authorized market differential for direct delivery of milk to a city plant or market; (2) the transportation differential paid for milk delivered progressively closer to the primary market; and (3) the higher transportation rates paid within the "nearby" zone as contrasted with the rates for each 10-mile zone in the balance of the milkshed.

3. Whether the Secretary's findings were deficient, inconsistent and unsupported by valid and substantial

evidence, and his conclusions and decisions irrational, inconsistent and arbitrary.

4. Whether the operation of the nearby differential is illegally discriminatory and violative of constitutional rights to due process and equal protection of law.

STATUTES AND REGULATIONS

The pertinent provisions of the Agricultural Marketing Agreement Act of 1937, as amended, and the regulations involved are set forth in the Appendix to the Petition. The related findings of the Secretary are set forth in the Appendix to this brief, as well as in the Appendix to the Petition in No. 874 and in the Joint Appendix below which has been filed herein.

STATEMENT

A statement of the case is set forth in respondents' brief in opposition to the Petition in No. 1076, the related petition of the Secretary of Agriculture, as well as in respondents' brief in opposition in No. 861.

ARGUMENT

THE NEARBY FARM LOCATION DIFFERENTIAL OF THE CONNECTICUT MILK ORDER, THE ONLY ORDER OUT OF 75 FEDERAL MILK ORDERS THAT CONTAINS A NEARBY DIFFERENTIAL, GRAPHICALLY ILLUSTRATES (1) THE LACK OF ANY IMPORTANT FEDERAL QUESTION; (2) THE CORRECTNESS OF THE DECISION BELOW; (3) THE IRRATIONAL AND DISCRIMINATORY NATURE OF SUCH DIFFERENTIAL; AND (4) THE CHAOTIC CONDITIONS THAT WOULD ARISE IN EVERY MILK MARKET IF JUDICIALLY VALIDATED AND EXTENDED.

The brief of the State of Connecticut makes the primary contention that invalidation of the nearby farm location

differential by the lower courts "threatens to visit a substantial decline in price on Connecticut's many dairy farmers and thus a serious blow to the State's dairy economy". However, the brief never actually explains how or why this indicated result would occur, and it even neglects to proffer any approximation of such purported loss to Connecticut producers. These unexplained omissions require at least a brief examination of the Connecticut milk order in the light of illuminating facts, particularly since the reasons advanced for the granting of the writ – continuation of the Connecticut nearby differential and the citation of the *Cranston* district court decision – are formulated in large part on the basis of this primary contention.

Initially, the respondents note that the marketing area of the Connecticut federal order is defined as the State of Connecticut,[1] and this is the only milk order out of about 75 federal orders wherein the marketing area is defined by the borders of a state. *It is also the only milk order in the United States that contains a nearby differential provision,* a fact that attests to its invalidity and the lack of necessity therefor.[2]

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[1] See 7 C.F.R. 1015.2, set forth in the Appendix (App. B, p. 1b) appended hereto, the same listing relevant matters that evidence the inaccuracy of the contentions of petitioners and *amicus curiae,* and the total error of the *Cranston* district court decision. An examination of the index of the Appendix will disclose a *brief* reference to virtually any matter upon which the Court might have a question, and the index is arranged under appropriate headings for the Court's convenience. The Joint Appendix in *Allen* in the court below contains more detail in respect to findings of the Secretary, testimony at administrative hearings, etc., and said Joint Appendix of 323 pages is also filed in this Court.

[2] In spite of this admitted fact, the *Cranston* district court decision, like the briefs filed herein, fails to mention that no other milk order contains a nearby differential. Indeed, both imply that the nearby differential is found in other orders, the *Cranston*

(Cont'd.)

All producers in the State of Connecticut and the small number in the State of Rhode Island are eligible for the 46-cents nearby differential of the Connecticut order,[3] along with a limited number of producers located in minor areas of New York and Massachusetts. 7 C.F.R. 1015.72-(a). Producers with farms located in other limited areas of the latter two states are eligible for a 23-cents nearby differential over and above the uniform price under subsection 1015.72(b) of the Order. It is indisputable that these provisions are for the benefit of Connecticut producers, the enumeration of the aforesaid limited areas outside of Connecticut being more evidential of this fact than of any true desire to accord fair and equal treatment to non-Connecticut producers or to comply with the Commerce Clause and other Constitutional limitations. The producers in the 23-cents "nearby" areas number about 90 and those in the unenumerated non-nearby areas who serve the Connecticut market approximate the same number. Significantly, there are so few non-nearby producers under the Connecticut order that the nearby differential thereof results in the payment of but 2-cents per hundredweight or $12.50 monthly to Connecticut producers at a cost of about 44-cents per cwt. to the non-nearby producers, the gain to the Connecticut producers being at the rate of a penny per cwt. as recently as 1963. The following testimony of James Lee, economist for the N.E.M.P.A. and formerly with Office of the Market Administrator at Boston, was given during the 1963

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[2] (Cont'd.)
district court decision stating that "they are vital to achieve orderly markets, an avowed objective of the Act", and the Connecticut brief referring to regulation of "milk markets throughout the Nation" in a manner which would indicate that such a differential existed in numerous other markets or orders. (See p. 13 of brief *amicus curiae*).

[3] Rhode Island producers supply only about 2 percent of the Mass.–R.I. market's milk supply (R.A. 224) and a very small part of the Connecticut milk supply.

administrative hearings when Mr. Lee testified in favor of such nearby differential in the Connecticut and consolidated Massachusetts-Rhode Island milk orders:

"Cross-examination by Mr. Tipton:

"Q. All right. Let me ask it another way. Are you familiar with the amount that the Connecticut market takes out per hundredweight in order to obtain an aggregate amount of money to pay nearby farm location differentials? A. Yes. And the values and rates are set forth in table 2.

"Q. In Table 2 it is shown for all producers as 45 cents, is that correct, for the period of 1962? A. Yes.

"Q. And the differential is 46 cents, is that correct? A. The value per hundredweight of all of the differentials in Connecticut was 45 cents. The rate to the nearby producer was 46 cents.

"Q. The rate that they received was 46 cents? A. Yes.

"Q. And the amount that was deducted from all the milk in the pool was 45 cents. If the nearby farm location differentials were deleted from the Connecticut market, there would be a net loss of approximately one cent, is that correct? A. Yes.

"Q. So what advantage does the nearby farm location differential give to the nearby producers other than a one cent gain in their price, anything? A. I didn't mean to imply there was any substantial advantage in that regard.

"Q. Well, is there any substantial advantage in that regard? A. I said no."

* * *

"Q. Just so we understand, the deletion of the nearby farm location differential would not affect the

the Connecticut price to nearby producers of a very substantial amount, and by that I mean one or two or three or four cents, something like this? A. The rate makes that obvious.

"Q. Continuing that line just a moment then, would you anticipate that if the nearby farm location differential was removed, there would be an increase of supplies in milk into the Connecticut market? A. No."

It would require the essence of legal legerdemain to argue that the Connecticut nearby differential provision is intended to reward nearby producers with a 2-cents differential payment rather than to penalize non-nearby producers at the rate of 44-cents for each hundred pounds of milk they market in Connecticut. The brief *amicus curiae* understandably does not mention any of these relevant facts in stating that "removal of the differential for the New England orders will reduce prices to nearby producers by significant amounts, and that a further result will undoubtedly be a marked acceleration in the number of producers leaving the market."

If the nearby milk of Connecticut producers has any "extra inherent value" whatsoever, it is clear that the 2-cents differential payments could be obtained as a premium from handlers who receive such alleged value rather than by exactions of 44-cents per cwt. from non-nearby producers' pockets. Any contrary argument or refusal to test the value of such milk in the marketplace is an admission that the cited factors of value are in fact nonexistent. Handlers can pay any premium over the uniform minimum price, but they will not do so for an illusionary value. The nearby differential is hardly "economically legitimate" under such circumstances, and it is equally obvious that there would be no price reduction or decline in respect to nearby producers if their milk is actually worth 2-cents over the uniform minimum price as the *amicus curiae* alleges in its brief.

The brief also understandably fails to advise that producers in the 23-cents "nearby" areas outside of Connecticut actually sustain a *loss* of approximately 17 cents instead of a gain of 23 cents by virtue of the existence of the nearby differential provision in the Connecticut order. This irrational result is likewise due to the fact that there are too few non-nearby producers to fully pay for the 46-cents nearby differential when access to the market is conditioned upon such a large penalty or tribute payment to the preferred producers within the State of Connecticut. The irrational and arbitrary action in continuing such a differential provision for 7 years when it admittedly operates in a manner totally inconsistent with its stated purpose is not only independent ground for striking it down but an acknowledgment that it is intended to operate as a trade barrier which reserves the fluid milk market or a larger part thereof to Connecticut producers.

The *amicus curiae* evidences awareness of these facts and the complete lack of any justification therefor by the unexplained failure to even mention the same in its brief. It merely speaks in generalities and without any substantiation for the implied and specific assertions made therein. For example, it states that "a substantial number of New York and Massachusetts producers are also located within the Connecticut Order nearby zone", but it neglects to inform that many of these producers are in the 23-cents "nearby" zone and that they sustain a *loss* instead of a gain as a result of the existence and operation of the nearby differential provision. Moreover, it fails to cite the following finding of the Secretary at 25 Fed. Reg. 7834 on August 16, 1960, in contending in the brief that the elimination of the nearby differential would substantially lower prices to Connecticut producers in some undefined manner:

> "*Complete elimination of the nearby farm location differential* would improve slightly the price disparity existing in the Dutchess County and Columbia County areas now in the 46-cents area and *would not*

significantly affect returns to producers in Connecticut. It would, however, increase the price to producers in the existing 23-cents area by about 17 cents and the price to upcountry producers by about 42 cents, * * *."

The Secretary also stated at page 7833 of his said Decision that, "Although the Connecticut blend prices have been substantially in excess of the New York–New Jersey price in competing areas, this situation would not have been changed appreciably in the absence of a nearby location differential provision". If the differential is not intended to act as a trade or market barrier, then there is no factual reason for its existence when its elimination would not affect Connecticut producers and its major effect is to injure non-nearby dairy farmers who *regularly* supply the Connecticut market's fluid milk needs. Its elimination could hardly result in disorderly marketing in view of the specific findings of the Secretary, particularly when the nearby differentials have been eliminated in the two adjacent markets and are not found in any other milk order in the country.

Additionally, the Report of the Federal Milk Order Study Committee (Nourse Committee), composed of a number of experts of national stature appointed by the Secretary, found that the Connecticut nearby differential payments by non-Connecticut producers constituted 'a barrier to the entry of additional supplies from adjacent production areas and tend to prevent desirable intermarket adjustments". The Committee singled out the Connecticut order in respect to other restrictive and unfair measures employed in that market to maintain an unnaturally high fluid utilization rate to the detriment of outside producers, and excerpts from such Report are set forth at pages 25-29e of App. E to this brief. Such restrictions are injurious pricewise to consumers and represent a continuing threat to an adequate milk supply in some instances. Moreover, the preferences shown a local milk source may result in an

overall lowering of the quality of the milk supply and an actual health hazard to consumers within the marketing area.[4]

In ignoring all of the foregoing, the brief observes that "the payment of higher prices to nearby producers in unregulated markets and as a part of cooperative producer payment plans was at the time of passage of the Act a phenomenon of which dairy economists, dairy industry personnel, and farmers were well aware". In support of these generalities, the brief refers to a 1929 map of producer prices, the Act being passed in 1933, amended in 1935, and reenacted in 1937, and to an isolated comment concerning seasonality of production in a book by Cassels. Respondents note that pre-1929 prices are not only incompetent to illustrate the conditions and prices prevailing at the time of passage of the Act, when the low prices to *all* producers necessitated its enactment, but that rapid improvements took place in the early 1930s' in respect to motor trucks, highways, technological advances, refrigeration, etc., that affected milk supplies and prices. It is also a well known fact that cooperative associations were organized by producers in metropolitan areas, and that such nearby-dominated associations accepted more distant members only as a matter of self-preservation in order to maintain some control over alternative milk supplies, the failure to do so enabling handlers to pit one area against another to the mutual disadvantage of all producers. In view of these facts and the refusal of the Massachusetts Milk Control Board to assist in the enforcement of the new federal program unless its producers were given a supposedly temporary price preference, it is not surprising that "nearby" producers were awarded preferential

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[4] See testimony of Dr. Stewart Johnson, economist for Connecticut Milk Producers Association (CMPA), set forth in App. E, pp. 19-25e, of this brief, testifying in 1956 N.Y.–N.J. administrative hearings. Dr. Johnson also testified in favor of the nearby differential in *Cranston*.

by nearby-dominated associations prior to the Act[5] and under the early federal licenses that were obtained by them without the procedural safeguards enacted in 1935 when orders replaced the licenses. However, the repetitive usage of the term "similar differentials" to equate such early base-rating with the nearby differential not only confuses two different things but actually constitutes an admission of the illegality of the nearby differential. The illegality of the early base-rating whereby nearby producers were paid a Class I or fluid milk price for their base milk and the non-nearby producers a composite or blend price that carried the surplus of the market is pointed up by the 1965 amendments to the Act. The Act clearly requires that all producers be paid a Class I price for their base milk, and their bases are computed in relation to their marketings over a representative period of time. Producers may produce more than their "base" under a Class I base-rating or base-excess plan, but they receive the Class II or surplus price for such excess over their base. The purpose of the plan is to bring production within the needs of the market and to thereby eliminate unnecessary surplus. It is in no way comparable to the nearby differential, for it applies to all individual producers, not to groups or classes of producers. Secondly, it must be separately approved in a referendum among individual producers on this question alone, not in connection with bloc voting by an association for its membership on a milk order as a whole. Thirdly, it is a method for seasonal adjustment of production to control unnecessary surplus, not for the apportionment of the fluid market to one group of producers

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[5] But see App. C, pp. 1-5c, to this brief re normal operation of classified use plans of most cooperative associations and that contemplated by the Act.

in a particular area of the milkshed and the necessary surplus to the remainder in another area without consideration of the individual variations among each group and area. Fourth, the Secretary specifically found in his 1964 decision, 29 Fed. Reg. at 11225, that a base-rating or base-excess plan was inappropriate for the New England markets. (See App. E, pp. 10-11e, of this brief). Moreover, the New England orders already include a seasonal incentive plan to reward evenness of production. (See App. E, p. 11e, to this brief).

Additionally, the reliance of the *amicus curiae* and the *Cranston* decision on the early base-rating provisions in the Greater Boston licenses is clearly misplaced, both in respect to justification for awarding a larger share of the fluid milk market to nearby producers through the nearby differential and in respect to Congressional ratification of such allegedly "similar differentials" by the 1937 re-enactment of the Act.[6] In allotting preferential bases under License 15 in 1933, the License specified three exceptions to the general method of awarding bases.[7] One related to producers whose milk on September 1, 1933, was being trucked *directly* from farms to plants located in the marketing area.[8] The second

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[6] See App. C, pp. 33-35c, to this brief for excerpts from the Congressional reports re reasons for re-enactment of the Act and the language of this Court in *Brannan v. Stark*, 342 U.S. at 465-66 regarding such re-enactment and lack of administrative construction of import because of infrequency of order provision.

[7] See App. E, pp. 1-2e, to this brief for description of bases in 1933-35 Greater Boston milk licenses.

[8] This is the market or direct delivery differential specifically authorized by the 1935 amendments to the Act, and it was the "practice of business" referred to in the Congressional Reports and Record.

related to country producers delivering milk under a base-rating plan in effect on said date, and the third exception was in favor of the Guernsey producers who received bases equal to the average daily sales of Golden Guernsey milk in the market as Grade A fluid milk or under the Golden Guernsey trade name during the general base period.

However, the "similar differentials" and "ratification" arguments did not enable Golden Guernsey producers to obtain an added differential for their milk under the New York federal order when they argued that the butterfat differential did not adequately compensate them for the greater marketability of their milk for fluid use or for their additional production costs. *N. Y. State Guernsey Breeders Co-op v. Wickard,* (CAA 2, 1944) 141 F.2d 805, *cert. denied,* 323 U.S. 725 (1944). Although the Guernsey producers were able to show that they had been able "to secure a higher-than-average Class I (fluid milk) utilization for the milk of their members" prior to regulation, the Second Circuit still held that they were not entitled to a differential over the uniform minimum price:

> "This finally is the ultimate issue in the case – one, of course, of outstanding importance in milk regulation. It seems to us that the Secretary has correctly construed the law, and that production costs or marketability are not in themselves factors to influence minimum milk prices. For such prices it hardly seems pertinent that special allowances should be made for milk more expensively produced, or more extensively and successfully advertised, but not better in grade or quality. In a purely competitive industry factors of this kind may well affect the market price, *but when regulation by way of minimum price is substituted by reason of the very disorder of*

the market and its effect in impairing farmer purchasing power (Sec. 1, 7 U.S.C.A. 601), *it is not surprising to discover no allowance for them in the governing authority.*"

Moreover, the Second Circuit noted that the high fluid utilization rate and resultant higher prices might have been due to extensive advertising, superior selling practices, *or proximity to fluid markets,* the specific inclusion of the latter factor indicating that the Second Circuit did not view such proximity to fluid milk markets, or any previous higher-than-average Class I or fluid utilization as a result of such location of certain producers, as a valid reason for special treatment of such "nearby" producers. Significantly, Circuit Judge Frank was a member of the panel that rendered this unanimous decision, and he obviously did not regard the Secretary as having unfettered discretion under the Act as contended by the *amicus curiae.* The *Cranston* decision thus purports to "overrule" not only the *Allen* courts in respect to a differential and milk order that was solely before the District of Columbia Circuit, but it is obviously in conflict with the Second Circuit and this Court. (See also *Knudsen Bros. Dairy v. Freeman,* 303 F.2d 886 (1962), and *Kass v. Brannan,* 196 F.2d 791, *cert. denied,* 344 U.S. 891, from the Second Circuit, as well as the decisions of this Court in *Lehigh Valley Cooperative v. United States,* 370 U.S. 76 (1962), even the dissent in the latter case upholding the concept of price uniformity under marketwide equalization that is set forth in numerous decisions of this Court and lower courts).

The antiquated contentions concerning accessibility or reliability of nearby milk are also devoid of merit. Nearby producers supply a lesser part of the fluid milk under the New England orders, and the Secretary has previously stated that this factor is "appropriate for consideration with direct delivery differentials payable by handlers

rather than out of the pool". 22 Fed. Reg. 4213. Even the economists for the nearby associations have acknowledged that such factors do not form a basis for the promulgation or present existence of the nearby differential,[9] and it is clear that the differential would not have been grounded on the historical use of nearby milk if any legal and rational basis existed for its issuance. Additionally, the findings of the Secretary also acknowledge that higher prices to nearby producers in Massachusetts, Connecticut and Rhode Island were attributable to the artificial prices *required* to be paid to local producers under State regulation when the latter were able to market their milk.[10]

The brief makes the same inapt reference to the 1929 map in citing Dr. John D. Black's book on the AAA program in support of the value of nearby milk.[11] In addition to the foregoing reasons for the inapplicability and incompetency of such contentions, it should be realized that Dr. Black's book was published about one month after the passage of the 1935 amendments to the Act involved in this case, and there is little discussion of the same therein, other than to quote approvingly from the definitions in the Congressional Reports in explanation of differentials enumerated in the Act. Moreover, Dr. Black, a Massachusetts resident, refused to endorse the nearby differential when he testified during the 1956 administrative hearings for the New

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[9] See testimony set forth in App. D, pp. 18-19d; App. E, pp. 12-16e and 19-25e, in Appendix to this brief, and the testimony set forth in detail at pp. 141-98 of the Joint Appendix below.

[10] See App. D, pp. 4-5d, 10d, 14-15d, 16d, to this brief, and pp. 112-41 of Joint Appendix below.

[11] It is a little known fact that Dr. Black was employed by the USDA at the time he was writing said book.

York-New Jersey order, and it is understandable that he did not wish to directly contradict any earlier views that he possibly had when he stated in 1956:

> "Q. And you don't believe that nearby milk has any further value than indicated by that principle?
>
> A. That involves the question of the 40-mile zone which you had up earlier before, and I begged off on answering that one because, frankly, I haven't studied that one in the different markets. I have set in on the discussions of it when they first set up the Boston milk order. *I had a personal interest in it because it happens that a brother of mine has a dairy farm a few rods short of 40 miles from the State House in Boston.* He gets the 46 cents premium on his milk because he is there. The justification for it in those days may be different from the justification for it now. * * * I would rather not venture a judgment on that." (R. 4446, N.Y.-N.J. administrative hearings, 1956).

Dr. Black further testified against the "un-American" exclusion of "distant" dairy farmers from sharing in the fluid milk markets; the inability to "defend present arrangements or future arrangements too much on the long distant past"; the failure of the Connecticut market to carry its fair share of surplus because of "the administrators in Washington"; and the fact that nearby milk in non-federal markets would be priced at virtually manufacturing milk prices except for the stabilizing effect of the federal orders in adjacent markets.[12] Dr. Black also rejected the view of some nearby producers that if a particular area does not produce as much milk as it consumes, the prices to producers in that area should be

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[12]See App. C, pp. 30-31c; App. D, pp. 19-20d; App. E, pp. 30-31e, to this brief for Dr. Black's testimony during the 1956 N.Y.-N.J. hearings, which also involved the Connecticut marketing area.

raised high enough to induce the extra production or a large part of it. This policy, detrimental to consumers and the producers excluded from such a controlled market, is pursued with governmental approval in the Connecticut market at the insistence of politically influential groups such as the CMPA, and the brief *amicus curiae* fails to cite Dr. Black's testimony in 1956 concerning such an un-American and monopolistic approach which also injures "outside" dairy farmers by the exaction of the subsidy payments:

> "This is of course contrary to the whole conception and principle of free trade among the states upon which our republic was founded. That principle says that all milk of the same quality moving to one market shall sell at the same price delivered in that market, but that the price received for it at the farm will decrease with distance from this market strictly in line with the increase in transport and related handling costs. Furthermore, milk will move to this market from points outward from the market till a point is reached where the milk will net more if shipped to some other market or put to some other use * * * ."

The maintenance of a high fluid utilization rate by restrictive techniques which constitute a refusal to bear the necessary surplus associated with the Connecticut market results in a corresponding decrease in the fluid utilization rate and milk price in the Massachusetts-Rhode Island market, in that such adjacent market must bear much of the surplus that should be borne by Connecticut producers. The resulting price disparity is increased when the Connecticut producers dump milk in the Massachusetts-Rhode Island market during periods of flush production, the control of virtually all Connecticut milk by the Connecticut Milk Producers' Association facilitating such disposition of excess milk in adjacent

markets. Moreover, a large number of Connecticut producers are entitled to receive a "nearby" differential of 46-cents per cwt. when their milk is dumped in the Massachusetts-Rhode Island market, and this additional reduction in the non-nearby producers' minimum milk price is utterly indefensible when one considers that Connecticut is a deficit market and the Massachusetts-Rhode Island market already has an excessive surplus of milk. Finally, the non-nearby producer must pay an additional "nearby" differential of 46-cents per cwt. to Connecticut producers whenever his milk is needed in the deficit Connecticut market.[13] It is clear that the discriminatory differential never existed prior to federal regulation, and it would have been an impossibility for handlers to "customarily apply" such a differential when marketwide pooling and a producer settlement fund did not exist in any market. The Act was passed because of such deficiencies and accompanying low prices to all dairy farmers, and the primary purpose of marketwide equalization pooling of milk and the basic purpose and policy of the Act are equally violated by such a discriminatory exception. It is obvious that the discriminatory device creates disorderly marketing of milk both within and between markets and that it is utilized for such purpose for the benefit of politically influential associations dominated by nearby interests.[14]

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[13] In spite of the related facts evidencing the interest of respondents, the *Cranston* court denied their motion for leave to intervene in that suit on the ground that respondents had no interest whatsoever in that litigation. Respondents had requested intervention for the purpose of moving to hold that suit in abeyance pending a decision on the *Allen* appeals, the latter motion also being denied by the *Cranston* court.

[14] The brief *amicus curiae* refers to an unsupported statement of Herbert L. Forest, USDA official, concerning a "new approach" (cont'd.)

In respect to the public interest aspects of Dr. Black's testimony, it should be noted that approximately 50 percent of the required milk supply for the Connecticut market is obtained from out-of-state sources, although a good part of the latter is not qualified as "pool milk" because of various restrictive provisions of that order. The ever-increasing population of the Northeastern metropolitan areas will necessitate additional procurement from non-Connecticut and non-Massachusetts sources, the dairy farms in the latter states being sold with increasing frequency for large housing subdivisions or presently run with this inevitable result and objective in mind. However, many non-nearby producers in primarily rural states are abandoning dairy farming because of inadequate returns, and such discriminatory devices as the nearby differential definitely accelerate the rate thereof and the resultant problems engendered for both rural and urban areas.

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[14] (cont'd.) to achieve orderly marketing if the nearby differential is eliminated, presumably to comply with sections 8c(5)(B)(ii), 8c(5)(D), and 8c(5)(G) of the Act. The utter lack of merit in such an "in terrorem" contention is illustrated by the fact that no unspecified "new approach" was necessary in the large New York-New Jersey milk order and market when that nearby differential was terminated after *Blair v. Freeman,* 370 F.2d 229 (1966), and the returns to all milk producers under that milk order were the highest in the history of that order within two months of such termination. (See App. E, pp. 33-35e, to this brief). In view of the fact that the Connecticut order provides for the payment of a differential of 46-cents and other price preferences to all Connecticut producers when they market their milk in the deficit Connecticut market, it is difficult to perceive the logic or consistency in Mr. Forest's contention that disorderly marketing will result if the Connecticut producers who market in the Massachusetts-Rhode Island market change to the Connecticut market. Moreover, it must be assumed that they have done so since (cont'd.)

Unlike the nearby producers, the non-nearby dairy farmer has no alternative economic opportunity in most rural areas when low returns and high costs drive him from dairy farming. He is unable to sell his land at huge profits for housing subdivisions or commercial development. He usually salvages a small piece of land with his modest homestead and thenceforth contributes little or nothing to the growth and economy of his community. His children or hired help migrate to cities which are already overcrowded with individuals who are ill-equipped by training and background for urban absorption. The present extent of this mounting problem cannot be overstated and is receiving the attention of the Congress, governmental agencies, a large number of states and many private organizations.[15] It is significant that the record below contains numerous affidavits from local and state officials in Vermont attesting to the loss of dairy farms in that state, and many non-nearby producers in upstate New York who market under the Connecticut order often lose $5,000 or more annually by virtue of that nearby differential. Many marginal dairy farmers could have stayed in business if the differential payments had not been exacted from their uniform minimum price, and their remaining in business would have inured to the

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[14] (cont'd.) the invalidation of the nearby differential of the Massachusetts-Rhode Island order, but there has been no "new approach" or "chaotic" marketing, and such contentions actually contradict the prior findings of the Secretary. Such illogical statements are made for the sole purpose of inducing judicial inaction and facilitating remand to the agency for disbursement of respondents' monies to nearby interests and attorneys.

[15] See Congressional Record, 91st Cong., 1st Sess., at S2034-S2040, E1214-E1215, and bills H.R. 7336, 7575, 7617, 7789 re "tax farmers"; also at H13227, H1007, E1421 re program to aid rural areas, rural job development, and rural migration to cities.

benefit of small business communities and the financial support of local governments.[16] A growing threat to the consumer welfare and an adequate milk supply is also inherent in an inconsistent and discriminatory differential that precipitates such problems and the demise of natural dairying areas which have no other substantial economic opportunities or industries.

The respondents respectfully submit that the Connecticut nearby differential, rather than serving as a reason for the granting of the petitions, actually demonstrates that the lower court's decision was correct and that such petitions should be denied. It graphically illustrates how such a device can be utilized in a most unjustifiable and discriminatory manner to injure producers and consumers alike. It forecasts the complete chaos and disorderly marketing that would occur in every market if such an illegal price preference could be obtained through political and group pressures. It predicts the nullification of the very purpose and policy of the Agricultural Marketing Agreement Act and a return to the cut-throat competition that led to a national emergency in the milk supply. It is clear that the narrow interest of Connecticut producers or Massachusetts producers may not predominate over the public interest or constitute a singular exception to the Act and Constitution. The *amicus curiae* have presented no reason that would justify the granting of the writ requested by the petitioners, and the Court is respectfully referred to the respondents' briefs in opposition to the petitions in respect to any contentions made by the *amicus curiae* that may not be treated herein because of undue repetition.

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[16] See affidavits from the record below filed in No. 1076.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March, 1969

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APPENDIX A

RELEVANT PROVISIONS OF THE AGRICULTURAL MARKETING AGREEMENT ACT OF 1937, AS AMENDED, 7 U.S.C. 601 ET SEQ.

§ 601. Declaration of conditions

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

§ 602. Declaration of policy: . . .

It is declared to be the policy of Congress –

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.

* * *

§ 608c. Orders regulating handling of commodity –

(1) Issuance by Secretary

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or

product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

* * *

(3) Notice and hearing

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) Finding and issuance of order

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

(5) Milk and its products; terms and conditions of orders

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such

prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk, which may be adjusted to reflect sales of such milk

by any handler or by all handlers in any use classification or classifications, during a representative period of time which need not be limited to one year. . . . Notwithstanding the provisions of subsection (12) of this section and the last sentence of subsection (19) of this section, order provisions under (d) above shall not become effective in any marketing order unless separately approved by producers in a referendum in which each individual producer shall have one vote and may be terminated separately whenever the Secretary makes a determination with respect to such provisions as is provided for the termination of an order in subsection (16)(B) of this section. Disapproval or termination of such order provisions shall not be considered disapproval of the order or of other terms of the order.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this

subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

* * *

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

* * *

(7) Terms common to all orders

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

* * *

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)-(7) of this section and necessary to effectuate the other provisions of such order.

* * *

(11) Regional Application.

* * *

(B) *Except in the case of milk and its products*, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

* * *

(16) Termination of orders and marketing agreements

(A) The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this chapter, terminate or suspend the operation of such order or such provision thereof.

* * *

§ 672. Agreements; licenses, regulations, programs, etc., unaffected.

(a) Nothing in this Act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license, or order which has been executed, issued, approved, or done *under* sections 601-604, 607, 608, 608a, 608b, 608c, 608d, 608e-1, 608f-612, 613, 614-619, 620, 623 and 624 of this title, but such marketing agreements, licenses, orders, regulations, provisions, and acts are expressly ratified, legalized, and confirmed.

(b) Any program in effect under sections 601, 602, 608a, 608b, 608c, 608d, 610, 612, 614, and 624 of this title, on January 1, 1950, shall continue in effect without the necessity for any amendatory action relative to such program, *but any such program shall be continued in operation by the Secretary of Agriculture only to establish and maintain such orderly marketing conditions as will tend to effectuate the declared purpose set out in section 602 or 608c of this title.*

APPENDIX B

RELEVANT PROVISIONS OF CONNECTICUT FEDERAL MILK ORDER

1015.2 Connecticut Marketing Area

"Connecticut marketing area" referred to in this part as the "marketing area", means all territory within the State of Connecticut, together with all waterfront facilities connected therewith and craft moored thereat, and all territory therein occupied by government (municipal, State or Federal) installations, institutions or other establishments.

* * *

1015.62 Plant zone price differentials.

The class prices and the basic uniform price computed under sections 1015.60, 1015.61 and 1015.64 shall be subject to zone price differentials based upon the zone location of the plant at which producer milk is received. . .

* * *

1015.72 Farm location differentials.

(a) In making payments to producers for milk received from a farm located in Connecticut, Rhode Island, in that portion of New York State east of the Hudson River and south of the Berkshire Section of the New York State Thruway, or in that portion of Massachusetts south of the Massachusetts Turnpike, there shall be added 46 cents per hundredweight.

(b) In making payments to producers for milk received from a farm located outside the area described in paragraph (a) of this section, but within that portion of New York State east of the Hudson River and south of the northern boundaries of North Greenbush, Sand Lake, and Stephentown townships in Rensselaer County, and within that portion of Berkshire County, Massachusetts north of the Massachusetts Turnpike, there shall be added 23 cents per hundredweight.

* * *

1015.91 Suspension or termination.

The Secretary may suspend or terminate this part or any provision thereof whenever he finds that it obstructs or does not tend to effectuate the declared policy of the Act. This part, in any event, shall terminate whenever the provisions of the Act authorizing it cease to be in effect.

* * *

1015.96 Separability of provisions.

If any provision of this part, or its application to any person or circumstances, is held invalid, the application of the provision, and of the remaining provisions of this part, to other persons or circumstances shall not be affected thereby."

RELEVANT PROVISIONS OF MASSACHUSETTS–RHODE ISLAND–NEW HAMPSHIRE MILK ORDER (LISTING CONNECTICUT PRODUCERS IN NEARBY ZONE).

1001.72 Farm location differentials.

In making the payments to producers required under § 1001.70, each handler shall add any applicable farm location differential specified in this section.

(a) With respect to milk received from a producer whose farm is located within any of the places specified in this paragraph, the differential shall be 46 cents per hundredweight, unless the addition of 46 cents gives a result greater than the Class I price determined under §§ 1001.60 and 1001.62 which is effective at the plant at which the milk is received. In that event there shall be added a rate which will produce that price.

CONNECTICUT

All of the State of Connecticut east of the Connecticut River and the towns of:

Granby. Suffield."

* * *

APPENDIX C

RELEVANT EXCERPTS FROM TESTIMONY AND STATEMENTS OF SECRETARY, AAA ADMINISTRATOR AND USDA OFFICIALS, CONGRESSIONAL MEMBERS, ETC., RE CONGRESSIONAL INTENT AND LEGISLATIVE HISTORY OF ACT, IN RESPECT TO PRICE UNIFORMITY FOR ALL PRODUCERS.

1. **Relevant excerpts from Economic Brief, USDA, paper no. 12, pages 82-84, re marketwide pooling or equalization; filed in Administrative Record of 1937 Greater Boston Milk Order**

"F. Equalization of fluid milk sales among producers

"The use plan of payment for milk puts all handlers in the market on an equitable competitive basis, and equalization of fluid milk sales is intended to do the same thing for all producers. Equalization of fluid milk sales is simply an extension of a plan that has been employed by each handler and each cooperative creamery. If a creamery sold 75% of its milk as whole milk and the remainder as cream, it did not pay 75% of its producers the fluid milk price for all their milk and the remaining 25% the cream price for all their milk. Such a method obviously would have been inequitable. Instead each producer was paid the whole milk price for 75% of his deliveries and the cream price for the remaining 25%. Under the proposed amendment to Order No. 4 the fluid milk sales of the whole market are distributed among all producers in the milkshed in exactly the same way as though they were all members of a cooperative association which equalized its fluid milk sales among its members.

The lack of any plan for an equitable distribution of fluid milk sales among all producers has been one of the principal causes of unsatisfactory conditions in the Greater

Boston Marketing Area during past years, for it has led to destructive competition among groups of producers. Under normal conditions in the Eastern markets, whole milk prices average approximately twice as high as the prices paid for milk reported for use as cream. However, the milk used as cream is of the same quality as the milk used for fluid milk and can at any time be sold as whole milk in competition with it. A handler's ability to pay his producers a favorable composite price, as compared with the price of competitors, has depended largely upon his not having so great a volume of surplus sales (in this case cream) as his competitors. If, by cutting prices, a group succeeded in selling a large percentage of its milk as fluid milk, its composite price would be higher than that of another group that received the full market price but carried a larger percentage of the surplus. Thus it was that a handler could cut the price of fluid milk in the city and still pay a composite price in the country, as high or even higher than that of the competitors who did not cut prices. (See part IV above for discussion regarding flat price buying.)

A few simple examples will illustrate the situation. If the Class I price is $3.00 and the Class II price is $1.50, and if there is 60% of the total milk sold as Class I, then a group of producers carrying its share of the market's surplus would return to its producers per hundredweight as follows:

60 pounds as Class I at $3.00	= $1.80
40 pounds as Class II at 1.50	= .60
Composite price per hundredweight	= $2.40

This group of producers has more surplus than it needs to take care of the daily fluctuations in its sales. Therefore, if it can contract to sell a portion of its surplus milk at any price above $1.50 per hundredweight, it will obtain a greater return for its milk. If it sold half of its surplus milk for fluid milk consumption at $2.25 per hundredweight, which is slightly more than one-half cent per quart under

the market price for fluid milk, and still continues (a practice not uncommon in Boston, particularly in the wholesale trade), the return to this group of producers per hundredweight would be as follows:

60 pounds as Class I at $3.00	= $1.80
20 pounds as Class I at 2.25	= .45
20 pounds as Class II at 1.50	= .30
Composite price per hundredweight	= $2.55

This group will have undersold the market by more than one-half cent per quart and by so doing [illegible] ave increased its composite price to producers for [illegible]k by $.15 per hundredweight. If the handler were a proprietary concern rather than a cooperative, he probably would continue to pay his producers approximately the same net price as competing dealers in the territory and pocket the increased return.

Normally, this group of producers will have increased its fluid milk sales only at the expense of another group in the market. Assuming that this other group carried originally the same amount of surplus, the return to its producers per hundredweight would now be as follows:

40 pounds as Class I at $3.00	= $1.20
60 pounds as Class II at 1.50	= .90
Composite price per hundredweight	= $2.10

More likely, however, in order to retain its fluid milk sales and maintain its price to producers, the second group, as well as other similarly threatened, would lower its own price to whom the cut-price milk was offered. Eventually, before the cut-price group succeeds in placing its surplus milk at a cut price, it might have to offer it to several customers and thereby have forced down the price on fluid milk sales of several times the volume of milk which it has to offer. If any considerable amount of surplus milk is thus offered to the trade at a cut price, it tends to force the fluid milk if the fluid milk price were eventually reduced to $2.25 as a result of this price cutting, it would

still be enough above the price of surplus milk so that the process could be repeated. It is by this method that competition among a few groups of producers or handlers has often reduced the net return to all producers in the Boston milkshed much below a fair market level. Sufficient control of milk markets to prevent such practices is highly desirable from the producer's standpoint. In many markets, price cutting has been carried to the point that producers withheld their milk from the market, causing a shortage of milk in the market. It should be obvious that when price cutting is carried to this point, it is inimical to the public interest.

The history of the Boston milkshed has shown that no group of producers can be kept from participating in the fluid milk market. The different groups either cut prices and share the fluid milk market on a lower price level, or else they cooperate and share the market on a fair and reasonable price level. Equalization of fluid milk sales throughout the market entitles each group of producers to maintain its share of the fluid milk sales without price cutting.

The actual operation of the equalization plan is simply a means of distributing to all producers equally the value of the fluid milk sales in the market by all handlers. With a 40% surplus in a market, each producer should get surplus prices on 40% of his deliveries. The Class I and Class II sales are not distributed equally among handlers. One handler may have no Class I sales, yet his producers are entitled to Class I price for 60% of their deliveries. But another handler may sell 100% of his producers' milk as Class I and his producers, if they are to carry the same amount of surplus as other producers, should get Class I price for only 60% of their deliveries. The equalization is made by the several handlers paying to producers through the equalization pool the difference between the Class I and Class II price on 40% of their total sales and to pay their producers Class I price for 60% of their deliveries, and for 40%, the Class II price. The first handler pays his producers Class I

price for 60% of their deliveries by receiving from the equalization pool enough money to enable him to pay producers for 60 percent of the milk received at Class I prices, and Class II price for the remaining 40%. If a handler happened to sell exactly 60% of his milk as fluid milk, he would pay producers directly for 60 percent of the milk at Class I prices, and for 40 percent at Class II, rather than paying them partly through the equalization pool.

The whole plan works exactly as if all handlers paid into the pool the value of their Class I milk times the Class I price plus the value of the Class II milk times the Class II price, whereupon the total sum would be distributed equitably among producers according to their deliveries. The Administrator's office acts merely as a clearing house for transactions. Thus there remains room for any gains through superior quality or differences in efficiency of any individual handler or association of producers, because any gain from operations after the milk has passed the receiving room door is retained by the handler or cooperative and not shared by the rest of the market."

2. **Relevant excerpts from the Congressional Record re price uniformity for all producers and inconsistency of "historically-higher price" preferences for certain producers:**

"MR. COPELAND: What has the Senator to say to the suggestion that in a number of communities in upstate New York there is not a sufficient supply of milk surrounding the market to take care of the demand; therefore, milk must be brought into the market from more distant points? The provisions of the equalization which we are now discussing provide that a producer who is producing his milk on farms near to the cities would receive the same price for his product as a farmer who produces his milk, say, 40 or 50 miles away from the same community.

MR. MURPHY: If they were embraced in the same marketing area, that would be true. * * * ." (79 Cong. Rec. 11140)

* * *

"MR. LA FOLLETTE: And insofar as whole milk is concerned it is my understanding that the agreements could apply, so far as the shippers of whole milk are concerned, only to those who have not, at the time the orders are issued, been shipping regularly into the given market.

MR. MURPHY: Precisely.

MR. LA FOLLETTE: In such a case, as to those who have not been accustomed to ship into such market, the terms would apply which apply to everyone else within the marketing area. In case an order is issued, however, and a particular shipper of whole milk, who had not been previously shipping into the marketing area, desires then to enter the marketing area, he would for a 3 months period have to take the lowest price classification for his product, after which time he would obtain the same prices as provided for others who had been regularly shipping in or who were producing within the area. Is that the Senator's understanding?

MR. MURPHY: The Senator has stated my understanding of the matter.

MR. LA FOLLETTE: I thank the Senator."

* * *

"MR. SNELL: . . . I do not understand exactly what this means, 'No marketing agreement or order applicable to milk and its products', and so forth.

"MR. JONES: That simply applies to fluid milk. You cannot make any limitation at all on the amount of butter or cheese or milk products that are shipped from any one area to another, and the limitation that may be applied on milk is only such limitation as puts

each area on an equality with the other areas after a certain period of about 2½ months." (79th Cong. Record 13022)

* * *

"MR. BOILEAU: . . . Mr. Chairman, I should like to ask the distinguished chairman of the Committee if in his opinion there is anything in this bill that gives to the Secretary of Agriculture or to anyone else any power to restrict the free flow of milk or any other commodity between the various States?

MR. JONES: No; there is nothing in it that will do that. The only tendency is to make all sections comply with the same rules." (79th Cong. Record 9572; *Lehigh Valley Co-op. v. United States*, 287 F.2d 726, *affirmed*, 370 U. S. 76, 93-94).

3. **Relevant excerpts from testimony by Administration before House Agriculture Committee in 1934:**

". . . Use of governmental powers to discriminate as between different groups of farmers has seemed to this Administration undemocratic and unjustifiable. The erection of 'tariff walls' around milksheds, creation of monopoly for farmers within, the exclusion by law of those outside, have the same unfortunate effects inside this country as erection of international trade barriers has upon world commerce. They lead to retaliatory action, which is injurious to the farmers and the public because it interrupts the economic flow of commerce." *Barriers To Internal Trade In Farm Products*, a Special Report to the Secretary of Agriculture by the Bureau of Agricultural Economics, USDA, March, 1939).

4. Relevant excerpts from Congressional Committee Reports re Section 8c(5)(D)* of Act and non-historical prices.

"To prevent assaults upon the price structure by the sporadic importation of milk from new producing areas, while permitting the orderly and natural expansion of the area supplying any market by the introduction of new producers or new producing areas, orders may provide that for the first 3 months of regular delivery, payments should be made to producers not theretofore selling milk in the area covered by the order at the price fixed for the lowest use classification. *This is the only limitation upon the entry of new producers – wherever located – into a market, and it can remain effective only for the specified 3 month period.*" (H.R. Rep. No. 1241, 74th Cong., 1st Sess. 11 (1935)

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* "608c(5)(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection."

5. Relevant AAA memoranda re interpretation of Sec. 8c(D) as only price limitation or "use" payment authorized by Act:

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL ADJUSTMENT ADMINISTRATION
WASHINGTON, D. C.

June 19, 1935
AAA-Solicitor

MEMORANDUM FOR MR. SETH THOMAS
Solicitor

Dear Mr. Thomas:

We are informed that the following section was inserted in H.R. 8492 as passed by the House on June 18.

Page 14 following line 11

"(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit the marketing in that area of any milk or products thereof produced in any production area in the United States."

Will you kindly advise us if, in your opinion, this added section will in any way adversely affect us, *particularly with reference to the interpretation of subsection (D)* on page 13, and if so, what further modification should be made.

Very truly yours,

/s/ J. W. Tapp,
Director,
Agreement and License
Division.

June 20, 1935
AAA-Solicitor

MEMORANDUM TO THE ADMINISTRATOR
Re: H.R. 8492

Dear Mr. Davis:

I have Mr. Tapp's request for my opinion as to the effect upon paragraph (D) of section 8c(5) of H.R. 8492 (p. 12) of the following amendment which was adopted June 18, 1935 by the House of Representatives.

> On page 14, after line 11, insert a new subsection, as follows: "(g) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit the marketing in that area of any milk or product thereof produced in any production area in the United States."

The provisions authorized to be included in orders regulating the handling of milk and its products are enumerated in subsections (5) and (7) of section 8(c). None of these provisions contemplate a prohibition of the marketing, within an area subject to such an order, of milk produced anywhere within the country. Paragraph (D) of section 8c (5), however, authorizes the inclusion in such orders of a provision requiring handlers to pay, for a period of ninety days, the price specified in the order to be paid for manufacturing milk, to producers who were not, prior to the effective date of the order, regularly selling milk for consumption in the area covered thereby.

From the language of paragraph (D) of section 8c(5), it is apparent that the inclusion of a provision *prohibiting* the marketing of milk from any production area is not intended to be authorized. What is authorized by that paragraph is a *limitation for a specified time* upon the price which handlers may be required to pay to "new producers." This interpretation of subsection (D) is apparent from the face of

the provision and, in addition, is borne out by the legislative history of H.R. 8492.

Concerning paragraph (D) of section 8c(5), the House Committee on Agriculture in its report on H.R. 8492 stated (Report No. 1241, p. 11):

> "To prevent the destruction of the minimum price schedules which may be fixed in an order, handlers subject to it may be required to pay, for a period of 90 days, the price fixed for milk classified for manufacturing purposes to producers not theretofore selling milk for consumption in the area covered by the order. This time *limitation* is designed to prevent assaults upon the price structure by the sporadic importation of milk from new producing areas, while permitting the orderly and natural expansion of the area supplying any market by the introduction of new producers or new producing areas. This is the only *limitation* upon the entry of new producers – wherever located – into a market, and it can remain effective only for the specified 90-day period." (Emphasis supplied).

It is also significant that in the House of Representatives an effort was made to amend the amendment adopted on June 18, so that it would have provided that no milk marketing agreement or order should "limit or tend to limit", (instead of "prohibit") in any marketing area prescribed therein, the marketing of milk produced in any production area in the United States. This proposed change in the amendment was defeated, (Cong. Rec. Vol. 79, No. 125, pp. 9987 ff), indicating clearly that the distinction between a "prohibition" and a "limitation" was recognized by Congress.

It is my opinion, therefore, that the amendment in question will not in any way adversely affect the formulation and administration of orders relating to the handling of milk.

Very truly yours,

/s/ Seth Thomas
Solicitor

6. Relevant material re Section 8c(5)(B)(ii)(a) of act or authorized market differential

(a) Relevant excerpts from 1935 draft of "Proposed Changes In Pending Draft Of Amendments To The Agricultural Adjustment Act As Requested By The National Cooperative Milk Producers' Federation":

"3. Rewrite sub-section A(i) of Sec. 8c(5) as follows:

(A) In the case of milk and its products, terms and conditions:

(i) Classifying milk in accordance with the form in which it is ultimately used or consumed, and fixing, or providing a method for fixing, minimum prices for each such use classification, which all purchasers of milk subject to such order shall pay, and the time when payments shall be made for milk purchased from producers or associations of producers. Such prices shall be uniform minimum prices for milk purchased from producers or associations of producers, subject only to adjustments for (a) the grade or quality of the milk purchased, and (b) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers and (c) volume, market or production differentials *or other differentials* customarily used in the market covered by such license.

4. Eliminate entirely sub-section (A)(ii)(a) of Section 8(c)(5) which provides for individual dealer pools.

5. Rewrite sub-section (A)(ii) of Section 8c(5) by eliminating the (b) before the second paragraph and rewrite this paragraph as follows:

(ii) Providing: That all producers and associations of producers delivering milk to handlers covered by such order shall receive uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered, subject only to adjustments for (a) the grade or quality of the milk delivered, (b) the locations at which delivery of such milk is made, (c) volume, market or production differentials *or other differentials customarily used in the market covered by such order,* and/or (d) a further adjustment, . . . "

(b) **Relevant excerpts from Act as enacted evidencing Congressional refusal to make such proposed changes:**

"(5) Milk and its products; terms and conditions of orders.

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) *no others*:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject *only* to adjustments for (1) *volume, market, and production differentials customarily applied by the handlers subject to such order,* (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers:

"(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided,* That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, *only* to adjustments for (a) *volume, market, and production differentials customarily applied by the handlers* subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, . . . "

(c) Relevant excerpts from Congressional reports defining market differential in sub-section (a), as set forth in Secretary's brief in *Blair v. Freeman:*

"Authorization for the promulgation of *location* differentials had its inception in the 1935 amendments to the Agricultural Adjustment Act of 1933. See 49 Stat. 750, 753. *By way of explanation,* the Committee Reports state:

'The market differential is a differential which is given to the producer to compensate him for delivering his milk to a

> city market instead of to a country plant. These differentials vary with the markets and cannot be qualified as a "location" differential, because of the fact that location is usually determined on the distance from a primary market whereas market differentials are usually paid in secondary markets. (H. Rept. No. 1241, 74th Cong., 1st Sess., p. 10; S. Rept. No. 1011, 74th Cong., 1st Sess., p. 10.)'

"*From the foregoing we think it evident that Congress intended* by *location* differentials to compensate producers for the added value of their milk which is attributable to his 'distance from a primary market'. That, precisely, is the objective of the 'nearby differential'. . . . Nearby differentials were considered justified principally because nearby producers historically enjoyed a greater percentage of the marketwide Class I sales (*hence they received more for their milk than did producers located more distant to the center of consumption*); . . . 7 U.S.C. 608c(5)(B)(c) was first enacted in 1935 by amendment to the Agricultural Adjustment Act of 1933. . . .

"The New York Milk Marketing Order, notwithstanding its early vintage, was not the first to recognize the need for nearby differentials; such adjustments were incorporated in the first Greater Boston Marketing Order promulgated on February 7, 1936 – less than six months after the enactment of the amendments to the Agricultural Adjustment Act which permitted adjustments for *'the locations at which delivery of such milk is made'*. See 2 F.R. 1331. . . . Indeed, the nearby differential provisions of the 1936 Boston and 1957 New York–New Jersey orders are, in substance, *identical in purpose and effect*. . . .

Thus, dating almost to the very enactment of 7 U.S.C. 608c(5)(B)(*c*) the Secretary has construed *that* provision as permitting the very type of nearby differential which the appellants would have this Court declare unauthorized. *It is, of course, axiomatic that such a long-standing contemporaneous administrative construction of the Section by the official charged with its administration is entitled to great weight. . . .* Finally, while we think that 7 U.S.C. 608c(5)(B)(c) plainly permits differential payments to nearby producers, the authority to promulgate such differentials is certainly to be found in 7 U.S.C. 608c(7)(D), which authorizes such other terms and conditions in addition to those expressly stated as are 'incidental to, and not inconsistwith the terms and conditions specified in subsections (5)-(7) . . . ' As we have shown, the nearby differential provided for in the 1957 New York Order, in substance, is *identical* to a similar provision in the 1936 Boston Order – *both provisions were promulgated on the basis of the same statutory provision; . . .* "

(d) Complete text of 7 U.S.C. 608c(7)(D) referred to above:

"(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)-(7) of this section *and necessary* to effectuate the other provisions of such order."

(e) Relevant excerpts from testimony of Donald Kane, Esquire, counsel for National Cooperative Milk Producers' Federation from 1933-39, called as witness by defendant-intervenors on October 20, 1967, in *Cranston v. Freeman: & Guilian, et al.*:

BY MR. CONARD:

"Q. Now what types of provisions could you recall were generally included in these various licenses that you actually worked on relative to the distribution of the proceeds from milk? . . . A. . . . I am interested in the dairy farm as such, but in practically every market by reason of economics there was a nearby differential, because the

nearby farmer's production was more even; *he delivered usually to the dealer's plant* or the dealer came out to his farm and picked up his milk. *It didn't have to go to a cooling station or receiving station and be cooled and then re-transported.* There are various reasons why nearby milk had a premium back in 1933, and I don't know anything about it today – I mean I can't make any statement about today, but from 1933 to '39 it was my experience that both in marketing, in licenses, and thereafter in orders, the orders varied with the markets and there are all kinds of differentials.

Q. But these differentials *that you have been describing* to the court here were included in licenses that you helped to prepare, is that right? A. That's right.

Q. And these included the differential between farmers in that particular marketing area that had to do with this relative nearness to the market *beyond the cost of transportation?* A. That's right.

Q. Now, Colonel Kane, what were your activities in 1935 in connection with your work with the Federation? A. In 1935 due to the decision in the Schechter v. United States, whatever the correct ruling was, we people in the Federation, our members and myself and my boss were afraid that the Agricultural Adjustment Act was going to be declared unconstitutional on the same ground, and that we better do something about having legislation ready to plug up the hole if the existing law was declared unconstitutional, and so over a period of about six months myself, as counsel for the National Federation, and ten or twelve attorneys for cooperative marketing associations throughout the United States, members of the Dairy staff of the Agricultural Adjustment Administration, certain members of Congress, Congressman Marvin Jones who was Chairman of the House Committee on Agriculture, Senator Pope of Idaho, Senator Murphy of Iowa was interested in

milk marketing, we all worked on legislation designed to get around the *Schecter* decision, that is, to provide a basis for milk marketing agreements and licenses that would not be subject to the criticism of unwarranted delegation of power, and still would be flexible enough so that these varying conditions in milk markets throughout the United States could be covered by a general statute.

And after a good bit of work, six months of it or better, I would guess, of continuous conferences, various drafts, we finally came up – my recollection is that it was pretty near to the last day, we had a bill that was fairly satisfactory to us, *and then on the final day when we had the final conference of all of our groups, we put some new language in the final draft,* and Mr. Jones introduced it the next day, I think, in the House of Representatives and it was introduced on the Senate side, I don't know whether by Congressman Smith of South Carolina or by Senator Pope, and that legislation was adopted and it is known as the Agricultural Marketing Agreement Act, I think, of 1935.

Q. Now, Colonel Kane, I show you the United States Code Annotated, Section 608c(5) and I ask you if by reading it you can recall this language you have just testified you recall was added near the very last day? A. Yes. In paragraph (B) (ii), and I think in other places – I would have to look through it – but we had provided the farmers would be paid for their milk subject to differentials for quality and for the place at which the milk would be delivered.

We were still trying to find broader language. So we started with the basic two things that we knew had to be in, the grade of the milk and freight.

But we couldn't find language that would give us a wide area that we wanted to operate in that was satisfactory to everybody, and I think finally what was

added in addition to the freight and quality and grade of the milk, we added these words that payments to producers were to be subject in addition to freight, in addition to quality, to differentials for volume, market and production differentials customarily applied by the handlers subject to such order.

I think that was the last thing we agreed on the day before Mr. Jones introduced the bill in Congress."

* * *

CROSS-EXAMINATION

BY MR. WEATHERWAX:

* * *

"Colonel, I think you said that preceding the submission to Congress of the Agricultural Marketing Act in 1935, *your committee*, comprised of many people, including, I think you said twelve lawyers and yourself, Mr. Hall, who was the previous witness, other lawyers, cooperative leaders, members of Congress, worked for a period of at least six months to prepare the drafting of the Agricultural Marketing Act to be submitted to Congress in 1935; is that correct? A. Yes, sir.

Q. And that on the last day when you thought you had prepared a suitable draft of the proposed legislation, you found out that a portion of Section (5) (B) (ii) was not suitable, and in haste you drafted *what appears to be presently in the Act as published in the statute*, official statute, as paragraph (5) (B) (ii) and then you submitted it that day to Congress for its consideration; is that correct? A. I certainly didn't want to give you that impression.

Q. Isn't that what you testified to? A. I don't think so. The quality differential and the location and

the transportation differential there was no difficulty about. We knew we had to have that for six months.

Q. But I am getting at this point – A. (Interrupting) We had to find language which would cover every market, and it took us six months to get it.

Q. And that is the language you are talking about, that is the language you came up with the last day? A. That's right.

Q. Is what is encompassed in this subparagraph of the section, that is it, is that correct? A. That's correct."

* * *

"Q. Now where was the change made in this paragraph or subparagraph that was made the last day? What was the change made? A. In the drafts – and these were simply drafts – the paragraph about payment to producers said that producers would be paid an equalized price subject to differentials for the quality and for transportation. They were always in it, and the last day we finally agreed on language which we thought would cover every other kind of differential from one end of America to the other.

Q. So, Colonel, do I understand it was then the last day that you agreed on the language which is as you indicated "provide for other differentials or other adjustments"? A. That's right.

Q. And the language that is incorporated in this subsection that I have referred to with respect to "(d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time;" was that the change made or was it the change made in the preceding part which is labeled (b)? A. We added (a), "volume, market, and production differentials customarily applied by the handlers subject to such order."

Q. *That was the part that was added the last day, "(a)"?* A. *Yes.*

Q. And that was incorporated into the statute when it was enacted by Congress? A. That's correct.

(f) Relevant excerpts from testimony of Richard Alpin, Market Administrator for Mass. – R.I. milk order, on Oct. 24, 1967, in *Cranston* case regarding market differential defined by Congress:

DIRECT TESTIMONY:

By MR. KRAUSE (Attorney, USDA):

"Q. Let me go on to the market differential, which is covered by the next full paragraph, being the first full paragraph on page 10.

> 'The market differential is a differential which is given to the producer to compensate him for delivering his milk to the city market instead of a country plant. These differentials vary with the markets and cannot be qualified as a 'location' differential, because of the fact that location is usually determined on the distance from a primary market, whereas market differentials are usually paid in secondary markets.'

Mr. Aplin, do you know of any differential that would come close to meeting the first sentence of that? Would this be something akin to the country station differential that you mentioned earlier? A. *I think so, because the first sentence of that paragraph refers to a differential for milk delivered to a city market instead of the country plant,* and I have described the differentials, the prices at country plants as compared to prices at city plants because of the country allowance in addition to the transportation allowance, so this might refer to that sort of differential, I think.

Q. But would such differentials be usually paid in secondary markets? A. No, because secondary

markets – at least, in my experience in New England, *the secondary markets tend to receive all or nearly all of their milk at city plants directly from farmers,* and it is the primary market, rather than secondary markets, that tend to jump over into other territory at country stations in order to obtain enough to provide for the primary market, and this has certainly been true in New England."

(g) Findings of Secretary re payment of "customary market differential" or premium for direct delivery prior and subsequent to Federal regulation in Troy, N.Y., area, 22 F.R. 4216 (1957):

"Although premiums to producers over the uniform price undoubtedly will continue to be paid by dealers in various areas in Upstate New York, provisions should be made for the payment of direct delivery differentials on deliveries to producers delivering to plants in and around Albany and Syracuse in order to insure an orderly transition from nonregulated to regulated status. Such differentials should be paid for all milk delivered by producers to pool plants located in the area and at rates as follows:

County–City or township	*Rate–dollars per hundred weight*
Albany:	
Albany	$0.10
Colonie	.10
Watervliet	.10
Green Island	.10
Cohoes	.10
Guilderland	.05
New Scotland	.05
Bethlehem	.05
Cocymanas	.05
Schenectady:	
Schenectady	.10

Glenville	.05
Niskayuna	.05
Rotterdam	.05
Montgomery:	
Amsterdam (city)	.05
Amsterdam (township)	.05
Saratoga:	
Waterford	.10
Rensselaer:	
Troy	.10
Rennsselaer	.10
Brunswick	.05
N. Greenbush	.05
E. Greenbush	.05
Schodack	.05
Onondaga:	
Syracuse	.05
Manlius	.05
De Witt	.05
Onondaga	.05
Camillus	.05
Solvay	.05
Geddos	.05
Salina	.05

Exceptions were taken to the proposed differential rates payable at plants in the city of Albany on grounds that operating conditions relating to producer receipts and distribution were no differnt at such plants than at plants just outside the city limits, thus subjecting operators of plants in the city to undue competitive disadvantage. Exceptions also were taken to the difference between the proposed rates in the city of Syracuse and those in surrounding towns on much the same basis and on the basis that the Syracuse rate is not in line with the *historical* pattern of producer payments. After reviewing these exceptions and the pertinent record evidence, it is concluded that the rate

applicable at plants in Albany should be reduced to 10 cents (from 15) and that the rate at plants in the city of Syracuse should be reduced from 10 cents to 5 cents."

7. Relevant illustrative excerpts from testimony of economists and officials of "nearby" associations re lack of a nearby differential as such prior to Federal regulation, 1963 Mass. – R.I. hearing record:

(a) From testimony of James Lee, economist for N.E.M.P.A. and former official of Administrator's Office For Greater Boston milk order.

CROSS-EXAMINATION

By Mr. Tipton:

"Q. I am sure you are very familiar with Exhibit 24, which contains an article on farm location differentials. In this article you portray or make a statement as to what testimony was entered at a hearing prior to the issuance of the order in 1937, which happens to correspond with the differential rate that was put into effect in 1937.

That differential, or the testimony that was given, closely related to the 46 cent differential, did it not? A. Yes.

Q. Now, can you tell me: Who paid that differential? I do not mean by name, but as a group. A. *Who paid the differential? There was no differential.*

Q. Did the handlers pay the differential? A. The handlers paid the producers who delivered the milk at the city plants a level of prices which was in relation to the up-country prices. as the evidence in the hearing record at that time, which is quoted in the article, explains." (R. 1718-19, Mass.–R.I. hearings).

* * *

"Such payments have been justified over the years as a recognition of the historical pattern of prices which existed prior to regulation, or as compensating nearby producers for sharing a part of the fluid milk market which they formerly enjoyed, with producers more

distant from the market. * * *" (R. 3393, Mass. – R.I. hearings).

(b) From testimony of Christopher B. Sykes, official of nearby organization:

CROSS-EXAMINATION

BY MR. TIPTON:

"Q. I am asking though what contributed to this higher price being paid? A. I have not made any statement that I know of about that. . . .

Q. Well, in the next sentence you say, *'This higher rate per hundredweight was not arrived at by milk dealers then through the process of computing a distant price and adding thereto a premium or differential in order to arrive at a final figure.'* Now I think that statement probably stands correct. However, did not these handlers arrive at the price at which they were willing to pay for the nearby milk by comparing that to a price at some other source? A. I think undoubtedly being big men they assessed the economic situation, yes, if that is what you mean.

Q. And they paid a higher price for milk from nearby sources as compared to milk from more distant sources for some reason, is that right? A. They must have had some reason, yes.

Q. Well, can you tell me some of the reasons you think it might have contributed to that higher payment? . . . A. No, I have no knowledge of the individual reasons that each individual handler might have used in arriving at this price. I make no assertion that I do know. . . .

Q. Who paid the differential prior to Federal regulation, producers or – A. If you read my direct testimony or heard me give it, Mr. Tipton, you know I have adopted the position that *it never was in fact paid by handlers to producers by such at all."*

(c) From testimony of Dr. David Clark, economist for nearby organizations:

BY MR. TIPTON:

Q. My last question was: What do you imply by the last portion of the sentence that I was referring to, on page 20? A. And the question is the one that reads: "These differentials *developed* in response to the need for some compensation to induce local producers to accept the provisions and consequences of marketwide pooling."

Well, what I had in mind here is that apparently historically producers located relatively close to the market had generally enjoyed a higher percentage of Class I utilization, either because of favorable relationships with local distributors or alternatively because of the fact that they were possibly in a better position to go into a producer-dealer type of operation, and thereby increase their Class I utilization.

Now, this particular advantage, under marketwide pooling – they were more or less asked to relinquish, *and as a compensation for relinquishing this advantage, the differentials were encompassed in the order.* This is my understanding of the material quoted at the hearing.

(d) From testimony of William J. Newman, Official of a nearby R.I. organization:

Q. Just one question, Mr. Newman. In the time in the southeast area prior to the promulgation of the market wide pool order, were these higher prices that were being received by local producers the result of any computation of distant prices *and then the adding of some amount to it* or was this just the product of Class I utilization in a handler's plant and reflected in the prices received by the producer shipping to him? A. Prior to the southeast order nearby farmers got returns that reflected the use value of that milk and we feel again that the nearby differential despite the arguments that were given for

discontinuance does reflect the added use value of nearby milk over distant milk and it should be continued.

Q. Let me ask one further question then. These handlers that were paying these prices as a result of higher utilization, they did not arrive at the final pay price to producers, did they, by any computation of any other price than the adding to it of a set figure like a differential? A. *No, that is right.*

(e) From the Federal Milk Order Study Report (Nourse Committee), Dec., 1962, introduced into evidence at the Mass. – R.I. hearing:

"However, the major *purpose* of nearby differentials apparently has been to compensate nearby producers for sharing market Class I sales with more distant producers in a marketwide pool. This principle seemingly was *founded* on the belief that in the absence of regulation, a higher percentage of nearby milk would be sold for fluid use."

(f) From the testimony of Irving E. Sutin, General Ice Cream Co., during 1949 administrative hearings on Springfield, Mass., milk order:

"It does seem that the 46-cents and 23-cents farm differential of the NEMPA would be illegal since it is contrary to the AAA of 1937. The Act provides for differentials 'customarily applied by handlers subject to such order'. *No farm differentials had ever been paid in the Springfield market.*" (R. 537, Springfield hearings).

8. **Testimony (conflicting) of Reuben Hall, Esquire, counsel for NEMPA, CMPA and others favoring nearby differential in *Blair* and *Allen*, on Oct. 20, 1967, in *Cranston* case:**

Q. Mr. Hall, you took your law degree in the year 1918, is that correct; A. Yes, sir.

Q. And in 1917 did you commence your association with a firm of lawyers in the practice of law? A. Yes, sir.

Q. And would you describe that very briefly to His Honor? A. I became associated in September of 1917, on entering my last year at law school, as a part-time assistant in the firm of Hoar and Dewey. Mr. Hoar at that time was counsel for the New England Milk Producers Association, and in that connection in October of 1917 I, with Mr. Dewey, Mr. Hoar and two or three other people, connected with the milk business, went to Washington and asked Mr. Hoover, who was then the Food Administrator, if he would create a regional milk commission who might under the Food Administrator's Authority, fix the prices to be paid to producers for milk which they delivered to dealers and otherwise regulate the marketing of milk in the Boston market, principally, but secondarily in smaller markets which were tributary to Boston.

Q. Did that assignment give you your initial work in the field of milk regulation and milk marketing?
A. Yes, sir."

* * *

"Q. Now am I not correct in stating the New England Milk Producers Association on the occasion of your trip to Washington, D.C., in 1918 and *your* meeting with Mr. Hoover – A. (Interrupting) 1917.

Q. 1917, *you* were concerned, were you not, primarily with the situation within the Boston milk market?
A. Yes, sir.

Q. And would you describe for His Honor the condition then prevailing in the Boston milk market? Also, the situation as it developed over the next few ensuing years?"

* * *

"Q. (Interrupting) To the northern producer?
A. Well, I speak of the northern producer, I mean the producer who was beyond 150 miles from Boston, and this figure, this differential which they paid to the nearby producer would be taken up in the overall accounting to all producers, so that on a use plan for milk delivered at the market, they paid for the percentage which they used as class 1, the class 1 price, they would account for what they used as class 2 at the class 2 price, then they would deduct from the overall amount, let's say if it was a cent a quart, 46¢ a hundredweight, it would be paid to the nearby producers as his premium or location preference, whatever you want to call it, and that would be deducted before the overall price to all producers was computed.

Q. And who was it that did this? A. The dealer, and the dealer did this under contract with the cooperative association, New England Milk Producers organization that I represented.

Q. So it was this voluntary program that was continued until 1933? A. Yes. But I would like to clarify one aspect of that voluntary program. *It didn't always measure the recognition of the nearby producer in terms of so many cents a hundredweight or so much per quart.* It might have been reflected in allocating under a so called base rating plan.

Q. You say it might have – did it, from time to time? A. It did. A preferential basis. Now the basis was an allocation to each producer of a fixed percentage of the milk which he produced and sold to a dealer for which he was to receive the class 1 price, and *the preferential provision of the nearby producer was to accord him a greater percentage of class 1 of his total production than was accorded to the producer who was beyond 150 miles.*

Q. And how was this reflected? A. This reflected itself in the price return to the nearby producer of approximately a cent a quart or 46¢ a hundredweight. It might vary one or two cents up or down, depending upon the total volume of milk."

9. From testimony of Dr. John D. Black during 1956 New York–New Jersey administrative hearings:

BY MR. LENT:

"Q. In speaking of the outlying portions of the area which are sometimes called in the New York milkshed, and of the reaching out for milk under historical circumstances that you have repeated and which I do not dispute, are you aware that as early as 1908 milk train service – Have you got a copy of Exhibit 59? A. I have it here, yes.

Q. – was in effect on the Rutland (Vermont) Railroad which crosses the upper part of the State of New York just south of the Canadian border and then goes over into Vermont and then down into New York City with milk for fluid use – do you know that development up there was as early as that? A. I didn't know that it was as early as that. It points, of course, to the fact which was more true in the early days than now, before we got our highways and our transport, that a railroad line, wherever there was a railroad line, just pushed its way out into a channel of transportation.

Your milkshed was like this (indicating) according to the railroad lines. That is the explanation of how that could happen way back in that period, you see.

Q. Let me review a little more history. You spoke of the spread of the milkshed in the late 1920's, I believe, if I remember right. Were you aware that in the late 1920's, I think along about 1926 or 1927, the Mayor of the City of New York called in the milk industry and said he was going to enlarge the milkshed

into Ohio unless more milk could be obtained from the present milkshed, and that as a result of that, milk train service was put in on the D and H Railroad, up along the east side of Lake Champlain, and many plants were started up just east of the Buffalo milkshed part of New York State in what had previously been fruit and vegetable territory?

Did you know that? A. Only in a very faint way.

Q. And that the supply so organized has been used to supply the fluid market as late as 1945, 1946 and 1947, when the percentage of Class I utilization in November of those three respective years was, respectively, 89 percent, 90.1 percent, and 88.9 percent? A. I was aware of those circumstances.

Q. When the farmers started producing more milk because of increased technology, that was a move that applied throughout the milkshed, was it not? It was no particular sin of these distant producers that had been shipping milk to the market since 1908, or since 1927, was it? A. No.

Q. And if there is going to be any carving or tailoring or cutting off done here, they shouldn't be singled out because of mere distance in any such plan, should they? A. You are offering an historical argument in favor of what I attempted to defend on other grounds.

Q. I appreciate that, Doctor, and I think you called it national economy. But the Act under which we are having this hearing speaks of the public interest, too, and I think we have a right to consider that. A. I agree.

Q. Have you any further comment to make in view of those historical facts and my calling your attention to the public interest feature of the Act? A. No, I haven't, except that we can't defend present arrangements or future arrangements too much on the long distant past, or what was just in the long distant past. Conditions change." (R. 4455-58, N.J.–N.J. hearings)

10. From the motion to intervene of Vermont (non-nearby) dairy farmers who intervened in *Hood & Sons v. United States*, 26 F. Supp. 672, *affirmed*, 307 U.S. 588, and pursued their claim concerning entitlement to "historical" fluid prices in Supreme Court, 59 S. Ct. 791, 306 U.S. 629, 83 L.Ed. 1032:

"Your petitioner has a further interest in the litigation in the above entitled suit arising out of the following facts:

Your petitioner has sold and delivered milk to the defendant H.P. Hood & Sons, Inc., for a period of many years prior to August 1, 1937. Since that date he has been and is now contiuing to sell and deliver milk to said defendant; and he has every reasonable expectation of continuing his present business relations with said defendant and of selling and delivering milk to said defendant in the future. The effect of Order No. 4, as amended, has been and now is to reduce and lower the price which your petitioner can obtain for milk sold by him to said defendant, and if said order is enforced against said defendant in the future, the prices which your petitioner will be able to obtain for his milk sold to said defendant will continue to be so reduced and lowered. Your petitioner is informed and believes and, therefore, avers that for many years the proportion of Class I milk purchased by the defendant, H.P. Hood & Sons, Inc., to the total milk purchased by it has been greatly in excess of the proportion of Class I milk purchased by all handlers in the Greater Boston, Mass., Marketing Area to the total milk purchased by all such handlers and that the defendant, H.P. Hood & Sons, Inc., has similarly purchased a higher percentage of Class I milk during each delivery period from August 1, 1937 to October

15, 1937. The 'blended price' computed and announced by the Market Administrator under the terms of Order No. 4, as amended, is based on the prices for Class I and Class II sales equalized among all producers selling to all handlers in said marketing area. If your petitioner were paid on the basis of Class I and Class II prices equalized among all producers selling to the defendant, H.P. Hood & Sons, he would receive a higher price for his milk than if he is paid on the basis of such prices equalized among all producers selling to all handlers in said marketing area."

11. **From the Congressional Reports re necessity for re-enactment of marketing provisions of Act:**

(a)From S. Rep. No. 565, 75th Cong. 1st Sess. 2-3 (1937):

"NECESSITY FOR REENACTMENT OF THE MARKETING AGREEMENT AND ORDER PROVISIONS

Certain district courts have interpreted the Hoosac Mills decision, which invalidated the processing-tax and production-control provisions of the Agricultural Adjustment Act, as also rendering the marketing agreement and order provisions of the act invalid. These programs, as authorized by the act and as administered by the Secretary of Agriculture, are designed to improve the purchasing power of farmers by encouraging orderly marketing through the regulation of interstate commerce. These marketing programs are not for the purpose of controlling agricultural production and, in fact, they do not control the production of any agricultural commodity. Furthermore, under the provisions of the act such programs were contemplated to operate separately and independently and not as a part of, or in conjunction with the production-control programs.

While to date the question of the constitutionality of

such regulation of interstate commerce has not been considered by the Supreme Court, the interpretation placed upon the Hoosac Mills decision by certain lower courts has rendered such programs temporarily ineffective in the districts to which such decisions apply; because these courts maintain that the Hoosac Mills decision invalidated the entire act, including this type of regulation in spite of the fact that the present act contains a separable provision.

The immediate reenactment of the marketing agreement and order provisions of the Agricultural Adjustment Act would remove the technical basis upon which such adverse decisions rest and enable producers to receive the benefits of such programs without the necessity of waiting until these cases have been finally acted upon by the Supreme Court."

(b)From H.R. Rep. No. 468, 75th Cong., 1st Sess. 2 (1937):

"REASONS FOR REENACTING THE MARKETING AGREEMENT AND ORDER PROVISIONS

The Supreme Court in *United States v. Butler* ((1936), 297 U.S. 1), declared invalid the provisions of the Agricultural Adjustment Act authorizing production adjustment programs involving processing taxes and benefit payments. The question as to whether Congress has the constitutional power to regulate interstate and foreign commerce in agricultural commodities through marketing agreements and orders as provided in the Agricultural Adjustment Act was not before the court and has not yet been determined by the court. Lower Federal court decisions have differed on the question, and in two cases courts have held that the marketing agreement and order provisions were inseparable from the production adjustment provisions which fell in the *Butler case.* As a consequence of these decisions, doubt has been cast on the validity of all the agreements and orders, and producers of

milk, particularly in New England, are now suffering from a seriously demoralized price situation.

The committee is of the opinion that Congress has the power to regulate interstate and foreign commerce in agricultural commodities in the manner provided in the act, and that an examination of the text and organization of the act and of its history shows these provisions are and were intended to be effective independently of the production adjustment provisions. The committee believes that this view will find the support of the Supreme Court.

Whatever may be the case, in order that whatever decision which may ultimately be rendered with respect to these provisions may turn on their constitutional validity rather than on their separability, and in order that express authority be given to enter into new agreements and orders in the areas in which they are necessary, it is highly desirable that these provisions be reenacted."

APPENDIX D

RELEVANT FINDINGS IN SECRETARY'S DECISIONS AND RELATED MATERIAL RE LOW PRICES AND DISORDERLY MARKETING CONDITIONS PRIOR TO ACT; NEARBY PRODUCERS' NEED FOR FEDERAL ORDER; AND BENEFITS TO ALL PRODUCERS FROM LEGISLATION.

1. (a) **From Findings In Promulgating First Greater Boston Milk Order, Feb. 7, 1936:**

"3. That the prices received by producers for milk sold in the marketing area were, for a long time prior to said hearings, at a level that gave such milk a purchasing power with respect to articles that producers buy considerably below the purchasing power in the base period."

(b) **From brief of Secretary in *Blair v. Freeman* and House of Rep. Concurrent Resolution No. 32, 73rd Cong., 2nd Sess., May 14, 1934, directing FTC to investigate the milk industry:**

"In the five-year period ending December 31, 1933, the wholesale price of milk sold by farmers fell fifty percent, although, at the same time, milk companies were still able to make a net profit on their investment in excess of 25 percent. Extreme cut-throat competition for the more lucrative fluid milk market engendered business practices which jeopardized 'the quality and in the end the quantity' of the vital fluid milk supply."

(c) **From the opinion in *Nebbia v. New York*, 291 U. S. 502 (1934):**

"In the four years from March, 1929 to March, 1933, the retail price of milk fell 37 percent, but the price paid to the farmer fell 61 percent. The dealer's margin was decreased only 17 percent. *** A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milkshed.

(d) From the opinion in *United States v. Whiting Milk Co.*, 21 F. Supp. 321 (D.C. Mass., 1937):

"A continuous flow of fresh milk into the Boston area *** from rural New England is imperative. *From the urban viewpoint, it is a matter of real necessity*. From the producer's viewpoint, it provides a dependable market for their product, and it is an important source of income to them. Less than 12 per centum of the milk brought into the Boston area originates in Massachusetts, and less than 2 per centum of it is handled exclusively in intrastate commerce. From 1929 to 1933 the prices paid for milk to the producers of New England declined steadily. In 1936, the price paid to producers of Vermont was 34 per centum below the 1929 level. *Conditions in other states were comparable*. Effective regulation has in the past proven to be a boon to milk producers. Heretofore, when federal regulation has failed, a resumption of chaotic marketing conditions and a lowering of the price levels has occurred. Experience teaches that a resumption of such conditions will occur if the defendant and others similarly situated are permitted to avoid compliance with the law."

(e) From the testimony of William Newman, Official of R.I. nearby organization, during 1963 Mass.–R.I. hearing:

"In the absence of government regulation of market milk prices during the past several years, prices received by producers for milk would be lower than they currently are in New England and other markets in the Northeastern states. A precise demonstration does not seem to be necessary to establish this fact. Government regulation has maintained prices to producers at a level more favorable than would have been the situation in the absence of such regulation." (R. 2647, Mass.–R.I. hearing)

(f) From testimony of W.A. Bronson, economist for NEMPA, hearings of Dec. 10-12, 1935, Greater Boston milk order, page 66:

"MR. LE BLANC: Mr. Bronson, can you tell us what is the real cost of production for 100 pounds of milk, now?

MR. BRONSON: I think the cost is very much greater than the price being received for the milk."

(g) From the testimony of Market Administrator in 1935 Greater Boston hearings, pp. 210-11:

"MR. TATOR: ... On this matter, *we have to confess to you that there is no one who has any accurate figure computed on just how much more those Massachusetts producers should receive for their milk*... It is different from what they have demanded. They have demanded, through their representative, that every drop of milk they make should be paid for at the Class I price... We do not recognize state lines, but if we were to take the position presented to us, the Massachusetts position, that you are really a tariff problem, we would set up a tariff barrier and say you cannot sell us lemons from Italy, or some other place. Now, these people want a better price down there. The Government has not recognized that. Whether these men who put in this license have put in too high a price, I do not know, but I can assure you men we will find out what the facts are and attempt to see that it is right."

(h) From testimony of Mr. Alpin, present Market Administrator and former USDA official, pp. 425-26 of 1937 hearings:

"MR. ALPIN: *You have heard the testimony here that these producer associations have nothing to say about the price of milk.* When we were operating in Boston we were continually told by the dealers, the large dealers, that they had to own their milk as cheap as their competitors, and that they intended to own their milk as cheap as their competitors. That being their policy, *and it has been their policy for years,* and they admitted under their own testimony yesterday that *the dealer sets the price and the producers have nothing to say about it. I think that you have very little assurance as to what the price will be without a Federal Order...*"

(i) From testimony of Mr. Carten, President, Nearby Producers Association, in 1937 Greater Boston hearing:

"MR. CARTEN: ... we have figures here from *one* of our producers from 1920 to 1930 for the price received for milk shipped to Salem, Massachusetts, to the H. P. Hood Company and they averaged – it is hard to average them exactly, because in all cases the butterfat wasn't given, but it was between – somewhere between $1.20 and $1.30 over the NEMPA price in the 19-mile zone. We should have at least a cent a quart over the equalized price to be protected. That would be 46¢ instead of 36¢, wouldn't it, Mr. Alpin?" (pp. 281-82)

(j) From testimony of W. A. Bronson, economist for NEMPA, pp. 267-68, hearings of June 30, July 1-2, 1937, Greater Boston milk order, re prices after suspension of order effective August 1, 1936:

"WITNESS BRONSON: Each year. I think the necessity of a Federal order is borne out by the situation this year and last year, *as far as nearby producers are concerned. Prices paid for milk to nearby producers inside the 40-mile zone in May last year under the Federal Order averaged 64 cents per hundredweight or nearly a cent and one-half per quart higher than the price received in May this year under the Milk Control Board basis of price.* A year ago the producers in the 40-mile zone averaged $3.10 per hundredweight for their milk – this year $2.46 per hundredweight, a decrease of 64 cents per hundredweight.

The comparison of milk prices under the Federal Order as compared with prices under the (Massachusetts) Control Board is still more unfavorable when compared with the prices paid last year and this year for dairy feeds. A year ago grain cost $1.64 per hundredweight, this year $2.50 per hundredweight. Last year 100 pounds of milk would buy 188 pounds of grain – this year only 102 pounds, a decrease of 86 pounds of grain or 46% in the ability of the milk price to purchase the most important item of expense

the dairyman has. There appears to be no question that *based on past history* a Federal Order can give these Massachusetts producers more money for their milk than a Milk Control Board Order without assistance from the Federal Government, and that even more money can be obtained for these producers under a joint order of both agencies."

(k) From the Report of the Massachusetts Milk Control Board of November 30, 1936, page 9, filed in 1937 hearings:

"In the opinion of the Board, Massachusetts producers cannot expect over any long period of time special protection against the competition of producers in other States ..."

(l) From the findings of the Secretary in promulgating the Springfield, Massachusetts Milk Order in 1949, 14 Federal Register 7085

"(a) ... Producers supplying milk to the Springfield market are located in Massachusetts, Vermont, New York, New Hampshire and Connecticut. Witnesses estimated that the number of producers outside the State of Massachusetts as from 30 to 40 percent of the total number supplying the market ..."

"(b) ... The record shows that conditions exist in the Springfield market which have resulted in a loss of market for several producers ... The unsettling conditions which are disrupting the Springfield market result from the opportunity on the part of milk handlers to purchase milk from producers outside Massachusetts wholly on an unregulated price basis *whereas the handlers who purchase milk from Massachusetts producers are required to make payments to producers in accordance with a classified price plan enforced by the Massachusetts Milk Control Board ...*"

* * *

"... The evidence in this record shows the need for Federal regulation *of all of the sources of milk* supplies for the Springfield market in order to give *Massachusetts* producers who are now supplying the market an *opportunity* to retain the market *on an equal basis with out-of-state producers.*

Any delay to study possible alternatives as suggested by the excepters threatens certain producers with the loss of their market with resultant unstable marketing conditions."

* * *

"Handlers purchasing milk under the regulations of the Massachusetts Milk Control Board are required to pay Massachusetts producers delivering milk to their plants these prices for the quantitites of milk utilized in such classes. Handlers buying milk out of State are subject to no governmental price regulation and purchase milk at a price competitive with the prices paid to producers in those areas for all milk. The level of the competitive price is dominated by either the uniform price established for producers delivering milk to plants regulated by the New York Federal milk order or the Boston Federal milk order or both. The uniform prices established under the Boston and New York Federal milk orders reflect the average percentage of Class I and of Class II in each of these markets. To the extent that any handler in the Springfield areas has sales of Class I milk which give him a higher utilization of Class I milk than the average for either the New York or Boston markets, that handler can purchase milk for such Class I sales at the uniform blend price paid producers in the Boston and New York markets for all milk. The evidence in this record indicates that handlers are aware of this opportunity, that some handlers have acquired milk on this flat price basis and that at least one handler intends to expand this type of buying in preference to purchasing milk from Massachusetts producers.

The advantage accruing to a handler purchasing milk outside the State of Massachusetts has increased in recent months as the uniform blend prices in the New York and Boston markets have dropped relative to the Class I price in each of these markets and in the Springfield market. The lower uniform prices result from substantial declines in excess milk values and in an increase in the quantity of milk utilized in excess classes.

In addition to the disturbing influence of out-of-state milk in the Springfield market, the lack of a uniform marketwide price plan for all producers supplying the market is a disrupting factor. The range in prices paid by 16 large handlers in the Springfield market to producers per hundredweight of milk testing 3.7 percent butterfat was, delivered at city plants, from $5 40 to $6.326 in June 1948 and from $6.05 to $7.005 in November 1948. In May 1949 the range in prices handlers paid producers in that region was from a low of $4.2162 to a high of $5.8177 per hundredweight of milk testing 3.7 percent butterfat.

The lack of price regulation effective with respect to all of the sources of fluid milk for the Springfield market and the absence of a uniform pricing method are contributing to the growth of an unstable milk market in this area. A marketing order is needed in the area to assure producers of a market for their milk at reasonable and uniform prices."

* * *

"The sources of milk supply for the various cities and towns in the proposed marketing area overlap and are intermingled to such an extent that the general supply area may be considered as one milkshed for the entire marketing area. In many cases handlers receive milk at a plant supplying several of the towns in the marketing area."

* * *

"The supply area for the Springfield market overlaps with the supply areas of other markets. . . "

* * *

"(6) *Payments to producers.* The percentage of milk utilized by individual handlers in Class I varies so widely that prices to producers have differed under an individual handler type pool by over $1.00 per hundredweight. Provision should be made for a market-wide type of pool in order that all producers delivering milk to all handlers may receive a uniform price for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered. This method of paying producers will require a producer-settlement fund for making adjustments in payments

by handlers so that the total sum paid by each handler shall equal the value of milk received by him and utilized in the classes established by the proposed marketing agreement and order."

* * *

"Most of the dairy farms in Massachusetts are close to urban centers. This probably explains why prices to Massachusetts farmers for milk sold wholesale average considerably more than the prices paid to Vermont farmers. This difference cannot be attributed to transportation cost alone. The many opportunities for dairymen to market their own milk directly influence the price which they demand for their product."

* * *

"Certain producers located outside the proposed differential area claimed that they should receive differential payments because they had been supplying the Springfield market for a number of years and they had received the Springfield price less a hauling charge. Some of these producers testified that they received prices approximately equal to the Boston blend prices at nearby country points. Other producers did testify that they were currently receiving a price which was about 50 cents over the competitive price in their territory. A price difference of that amount cannot be expected to be maintained in a period of adequate milk supplies."

(m) From testimony of C. W. Swonger, economist for NEMPA, at Springfield promulgation hearings:

"MR. SWONGER: ... what is needed is a type of regulation that would price all milk in the market on a uniform basis regardless of its source, and remove the incentive to drop local producers in order to obtain cheaper milk from outside unregulated sources... It is not possible to operate under a type of regulation that prices only about 60 percent of the milk. Unless a means can be developed to regulate all the milk in the market on a uniform basis, the price structure will collapse and local producers will be left without a market."

(n) **From the testimony of Irving E. Sutin, General Ice Cream Corp., at the Springfield promulgation hearings:**

"The past experience in the Springfield market fails to indicate any justification for these proposed differentials. A producer whose milk is delivered to a milk plant in the marketing area has been receiving the same price as other producers delivering to the same plant regardless of the location of his farm or the other farms from which the milk was shipped to the same plant. To provide differentials listed in the proposed Order would be a radical departure from accepted practice in the Springfield market. The proposed differentials would not only give premiums to producers whose farms are located in the cities and towns named and whose milk is delivered directly to plants in Springfield but would also be paid to those producers located in those cities and towns whose milk is delivered to country plants. This, likewise, is a departure from the marketing practices which have been followed in the Springfield market.

Adoption of the proposed differentials would impose without any justification a penalty and hardship on those producers who have been delivering milk to Springfield plants for many years...." (R. 333-34)...

"It does seem that the proposal of 46 cents and 23 cents farm differential of the NEMPA would be illegal since it is contrary to the AAA of 1937. The Act provides for differentials "customarily applied by handlers subject to such order". No farm differentials had ever been paid in the Springfield market." (R. 537) ...

"The other twenty per cent of producers would be penalized to pay for the gravy that the others would enjoy; or, if not penalized the alternative would be that they would be driven from the market. In effect, a Federal marketing order of the Federal Government would have the tendency to make second class citizens of those producers who did not happen to be located in the preferential area arbitrarily drawn." (R. 538).

(o) From the findings of the Secretary in Promulgating the 1949 Worcester, Massachusetts, Milk Order 14 Federal Register 7097

* * *

". . .The evidence in this record shows the need for Federal regulation of all of the sources of milk supplies for the Worcester market in order to give Massachusetts producers who are now supplying the market an opportunity to retain the market on an equal basis with out-of-state producers. Any delay to study possible alternatives as suggested by the excepters threatens certain producers with the loss of their market with resulting unstable marketing conditions."

* * *

"Producers supplying milk to the Worcester market are located principally in Massachusetts, Vermont and New York."

* * *

"The record shows that conditions exist in the Worcester market which permit handlers to purchase milk for fluid use at substantially different prices. These conditions must be remedied in order to establish and maintain such orderly marketing conditions as will establish prices to producers for milk delivered to the Worcester market that reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and milk products in the marketing area and which will insure a sufficient quantity of pure and wholesome milk and be in the public interest."

* * *

"Handlers purchasing milk under the regulations of the Massachusetts Milk Control Board are required to pay Massachusetts producers delivering milk to their plants these prices for the quantities of milk utilized in such classes. Handlers buying milk out of State are subject to no governmental price regulation and purchase milk at a price competitive with the prices paid to producers in those areas for all milk. The level of the competitive price is dominated by either the uniform price established for producers delivering milk to plants regulated by the New York Federal milk order or the Boston Federal milk order or both. The uniform prices established under the Boston

and New York Federal milk orders reflect the average percentage of Class I and of Class II in each of these markets. To the extent that any handler in the Worcester area has sales of Class I milk which give him a higher utilization of Class I milk than the average for either the New York or Boston markets, that handler can purchase milk from producers outside Massachusetts for such Class I sales at the uniform blend price paid producers in the Boston and New York markets for all milk. The evidence in this record indicates that handlers are aware of this opportunity, that some handlers have acquired milk on this flat price basis and that at least one handler intends to expand this type of buying in preference to purchasing milk from Massachusetts producers.

The advantage accruing to a handler purchasing milk outside the state of Massachusetts has increased in recent months as the uniform blend prices in the New York and Boston markets have dropped relative to the Class I price in each of these markets and in the Worcester market. The lower uniform prices result from substantial declines in excess milk values and in an increase in the quantity of milk utilized in excess classes.

In addition to the disturbing influence of out-of-State milk in the Worcester market, the lack of a uniform marketwide price plan for all producers supplying the market is a disrupting factor. In May 1949 prices paid to producers delivering to different handlers varried as much as $1.24 per hundredweight in this area for milk of basic 3.7 percent butterfat content.

The lack of price regulation effective with respect to all of the sources of fluid milk for the Worcester market and the absence of a uniform market-wide pricing method are contributing to the growth of an unstable milk market in this area. A marketing order is needed in the area to assure producers of a market for their milk at reasonable and uniform prices."

* * *

"The sources of milk supply for the various cities and towns in the proposed marketing area overlap and are intermingled to such an extent that the general supply area may be considered as one milkshed for the entire marketing area. In many cases handlers receive milk at a plant supplying several of the towns in the marketing area."

* * *

"(5) *Class prices.* Class prices for the Worcester market should be established on a formula basis similar to that under which class prices are determined for the Boston market. The Boston and Worcester milk markets are so interrelated that a close correlation of price changes is necessary to maintain stable market conditions. Boston is the larger market and therefore the dominant one in effecting price changes. The milksheds of these two markets overlap so that there is opportunity for producers to shift their supply from one market to the other if substantially different prices are offered. The Worcester market draws milk directly from plants at which milk is priced under the Boston milk order. Careful alignment of prices in the two markets is necessary to maintain equal cost of milk to handlers for milk used similarly."

* * *

"(6) *Payments to producers.* The percentage of milk utilized by individual handlers in Class I varies so widely that prices to producers have differed under an individual handler type pool by over $1.00 per hundredweight. Provision should be made for a market-wide type of pool in order that all producers delivering milk to all handlers may receive a uniform minimum price for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered. This method of paying producers will require a producer-settlement fund for making adjustments in payments by handlers so that the total sum paid by each handler shall equal the value of milk received by him and utilized in the classes established by the proposed marketing order."

(p) From the findings of the Secretary in Promulgating the Southeastern (State of Rhode Island and Southeastern Massachusetts) Milk Order in 1958, 23 Fed. Reg. 8225

"The Southeastern New England market is an interstate market encompassing all of the State of Rhode Island and a substantial area in Southeastern Massachusetts. Within this market there is a substantial and continuing interstate commerce, both in the procurement of milk and in the sale of fluid milk and its products."

* * *

"More than one-third of the fluid requirements for the Southeastern New England area originates from sources outside the States of Massachusetts, Connecticut and Rhode Island. Much of the upcountry milk is assembled and received at country plants in Vermont and New Hampshire and is then transported to the Southeastern market for processing and distribution. Additional quantities are handled by bulk farm tank pick-up and moved directly from farms in northern New England to plants in the local market.

The situation in both Fall River and New Bedford has continued to deteriorate as handlers, seeking to avail themselves of milk supplies at the most advantageous price, have tended to look to up-country unregulated supplies... As a result, local producers have had difficulties in maintaining regular outlets for their productions.... Much of this (local) milk is sold at *manufacturing* milk prices *even though the local supply is inadequate to meet the market demands.*

The situation in the Rhode Island part of the market is substantially similar to that in the Fall River–New Bedford area. Early in 1951 the association representing a large segment of the registered Rhode Island producers requested a hearing to consider a Federal order for that market because of the then existent market disorder. On the basis of the facts presented at that hearing it was recommended that an order be issued. However, following that decision the

association negotiated a settlement with local handlers which minimized the effect of the disorder and accordingly the association asked that the order not be issued.

The increase in available milk supplies generally and the fact that milk is readily available from upcountry sources at prices approximating the Boston blend has provided a strong incentive for handlers to drop local producers in favor of cheaper sources of supply.

Less than one-third of the fluid requirements of Rhode Island dealers are supplied by Rhode Island dairy farmers. An additional forty-five percent is supplied by dairy farmers located in nearby Massachusetts and Connecticut and the remainder is secured from other sources, primarily from the States of Vermont and New York. Several of the larger handlers in the market customarily have secured a lesser proportion of their necessary supplies from local producers than have other handlers. The buying advantage that these handlers have had on their purchases of outside milk has prompted other handlers to drop local producers in favor of sources of supply at upcountry points also.

* * *

Relatively large quantities of local producer milk were dropped during the latter months of 1957 and early 1958; in some cases entire pickup routes were dropped at one time.

Registered Rhode Island producers have enjoyed a preferential market over an extended period of years. The allocation program and the procedure employed by the responsible officials of the State in issuing permits for importation of nonregistered milk have tended to maintain such preferential market to the detriment of other dairy farmers whose production is an essential part of the market supply."

* * *

"Local producers, however, do not carry an unreasonable volume of the necessary market surplus. The overall Class II utilization for the market is only 5.8 percent of total market utilization and less than 10 percent of receipts from

registered producers which, from experience in other federally regulated fluid markets, is substantially less than the necessary reserve which a market such as Rhode Island must carry to assure a continuing adequate supply to meet daily and seasonal fluctuations in supply and demand. Hence, the market relies primarily on upcountry unregulated supplies and surrounding Federal order markets to provide the necessary reserves.... "

"A market structure which grants a preferential price to registered Rhode Island producers cannot provide a stable market for such producers over any extended period while handlers have the opportunity to gain a procurement advantage through the use of lower priced milk from upcountry sources. The State, as a practical matter, cannot effectively regulate milk which moves across State lines, and while local dealers may voluntarily reduce imports of outside milk temporarily to gain support from local producers, it is inevitable that the incentives for using unregulated milk will result in a loss of market for local producers.

The Southeastern New England market is a deficit market and must rely on sources of supply in northern New England and New York to supplement the local supply. Recent developments in bulk tank cooling and transportation facilities have contributed to efficiencies which permit greater flexibility of handler operations at greater distances from the consumption center in Southeastern New England."

* * *

"The marketing situation as it now exists constitutes a serious and continuing threat to the stable and orderly marketing of milk and to the maintenance of an adequate supply of pure and wholesome milk for the Southeastern New England marketing area.

The issuance of a marketing agreement and order for the Southeastern New England marketing area will contribute to greater stability of the fluid milk market and will tend to effectuate the declared policy of the act. The adoption of a classified pricing plan based on audited utilization of

handlers will provide a uniform system of pricing throughout the area and assure a fair and equitable return to all producers."

(q) From the findings of the Secretary promulgating the Connecticut federal milk order, 24 F.R. 1049, Feb. 11, 1959:

"Producers and plants outside Connecticut account, in total, for about 37 percent of the milk supplies of Connecticut handlers (not including producer-handlers). Volumewise, this quantity exceeds 30 million pounds per month. Such milk is commingled with milk produced in Connecticut for bottling and is then distributed on wholesale and retail routes throughout the State in competition with other milk processed both at plants receiving Connecticut and out-of-state milk supplies and plants receiving only Connecticut produced milk.... Since the period of milk shortages created by World War II, consumption of fluid milk in Connecticut has increased more rapidly than milk production by Connecticut producers. Each year, to satisfy consumers' needs, increasing quantities of milk have been imported from out-of-state sources, not subject to price control pursuant to the Connecticut Milk Marketing Act, for *fluid* distribution to wholesale and retail outlets.... These producers have become *regular* suppliers of the Connecticut market and their milk is delivered to plants located in such State on a year-round basis by direct delivery either in cans or in bulk tank trucks for principal use in *fluid* milk distribution. Prices paid for such milk generally have been lower than those *required* to be paid by the respective recipient handlers *pursuant to the Connecticut Milk Marketing Act to Connecticut producers* for that portion of milk produced in the State and distributed as fluid milk.... In addition, Connecticut handlers purchase tank truck loads of milk from unregulated country receiving stations or plants in eastern New York, Massachusetts, and Vermont. The lower prices paid by Connecticut handlers for this out-of-state country plant milk have caused appreciable competitive advantage for the purchasers, since such handlers are in daily competition for

both wholesale and retail customers with handlers who purchase all of their milk within Connecticut and account for it at the minimum class prices *established by State price control....* As the quantities imported have increased, market stability has deteriorated. The State price control authority, as a practical matter, cannot regulate effectively the pricing of milk supplies which move across the State's boundaries to remove the price incentives which are causing unstable marketing conditions for Connecticut producers."

* * *

"While the Connecticut market is in large measure supplied by dairy farmers whose milk is received regularly at distributing plants located in the marketing area, *such receipts are not sufficient to meet the total market demand for milk in all months.* Substantial quantities of milk are received *regularly* by certain handlers from distantly situated "country supply plants. The *greatest* need for milk from country plant sources occurs during the period July through November. These months are normally the months of lowest production for the State and adjacent areas production areas ... " 24 F.R. 1053.

(r) From the findings of the Secretary in promulgating the Massachusetts–Rhode Island milk order, 29 F.R. 11208, Aug. 4, 1964:

"... Distinguishable markets for milk in most of eastern Massachusetts and Rhode Island no longer exist, ... It is clear that a single marketing area has developed where previously separate markets existed. Under this circumstance, the economic stresses, marketing instability, and price uncertainties which have developed and persisted must be eliminated by the adoption of a single milk order with a single marketwide pool.... Moreover, as described under Issue No. 3, milk produced in these (nearby) areas has become overpriced under the order relative to country plant milk, and city plant operators often have preferred to purchase milk from country sources rather than from local producers. The situation is, in fact, one of the major marketing problems

dealt with in this decision because recently much of the locally-produced milk has had to be disposed of in manufacturing channels."

(s) From testimony of James Lee, NEMPA Economist and formerly with Market Administrator's Office, Greater Boston milk order, testifying for nearby differential during 1963 hearings:

"Q. So you are saying that in general handlers do not pay for milk according to its value? A. No, I didn't say that.

Q. Then in general do handlers pay for milk according to the value, too? A. Yes.

Q. So in general would a handler customarily apply a differential to milk which did not have an additional value to him over some other source?"

* * *

"THE WITNESS: I would not want to speculate now as to just what handlers would do price-wise, if we had this changed situation.

By Mr. Tipton:

Q. Well, do you know of handlers that are customarily applying the differential today to nearby milk? A. All handlers who are buying nearby milk are required by the order to pay producers the differential.

Q. They are paying a differential above the Class I price? A. No. What I mean is that the handlers are paying the blended prices established by the order.

Q. Do you know of any handlers in the nearby area that are paying in addition to the blend price a premium? A. I don't of my own knowledge know any handlers who are now, but if I said I did know that there are such, your next question would be "Who are they," and I just have the feeling that there are some –

Examiner Holstein: Let's not anticipate what Mr. Tipton's next question will be. This question is: Do you know of any? If you can answer that, do so; then when he asks his next question we will decide on that.

The Witness: I don't know the names of any handlers paying premiums."

* * *

"Q. So the handlers were purchasing milk on some kind of an opportunity basis. They were looking for the cheapest source of milk that met their demands. Is this correct? A. Well, I don't want to put all handlers in bed together on this, because they weren't all doing this. Some were paying the prices that the state control boards specified, and they did not seek this commerce that we are talking about now.

Q. But if the situation would have continued without Federal regulation, then you might have anticipated that all of them would have attempted to have got the cheapest supply possible that still met their demands as far as quality and regularity and all of these things? A. Yes, I pointed that out in my testimony."

(t) Testimony of Dr. John D. Black in 1956 administrative hearings involving N.Y.–N.J. milk order:

"... Of course, I do not understand fully what in recent years has been motivating the demand of strong groups in New Jersey for a separate milk market and federal order. But I suspect that some among them are still thinking more or less that since northern New Jersey does not produce as much milk as northern New Jersey consumes, the prices to producers in this area should be enough higher to induce this more production, or at least a good part of it.

This is of course contrary to the whole conception and principle of free trade among the states upon which our republic was founded. That principle says that all milk of the same quality moving to one market shall sell at the same price delivered in that market, but that the price received for it at the farm will decrease with distance from this market strictly in line with the increase in transport and related handling costs. Furthermore, milk will move to this market from points outward from the market till a point is reached where the milk will net more if shipped to some other

market or put to some other use. The first of these other uses is of course as fluid cream...."

"The opposition to including this outer territory within the big milksheds of course comes from the producers near to the big city markets. They insist that they are sharing the Class I markets with distant producers whose milk supply is not needed, and are getting too low blended prices in consequence. The near-in producers in New England and in New York State have generally come round to accepting the larger market-wide viewpoint in this matter. But very many in northern New Jersey apparently have not. Near-in producers should bear in mind that without the stabilizing effect of Order 27 and Order 4 their milk would now be priced at manufacturing values in the outer parts of the milkshed plus transportation costs and a small risk factor."

(u) From the findings in the Secretary's decision re amendments to New York–New Jersey and Connecticut milk orders, 28 F.R. 11956, Nov. 8, 1963:

"The reason for these depressed prices primarily was that an excess of milk above the quantity which could be used in whole fluid form was being produced and delivered to market. *It was demonstrated that whenever any significant excess of milk was produced for the fluid market, prices would fall to the level of manufacturing milk prices. The major problem now, as it was when the order was first established,* is to maintain orderly marketing for milk in this market in a situation where in order to assure consumers of sufficient quantities of milk at all times, it is *necessary* that more milk be produced and delivered to market than can be used as fluid milk. *In the absence of regulation, the maintenance of a necessary reserve of milk above Class I requirements has a depressing effect upon the prices for all uses of milk, including producer returns and an unstabilizing effect upon the marketing of milk int he area.* The institution of a classified pricing plan and marketwide pooling through the Federal milk order is the means for achieving

adequate and dependable supplies for consumers (which includes the necessary reserve) without the unstabilizing conditions and depressed prices to producers *which would otherwise result*. Under marketwide pooling *all* producers for the market share *proportionately* in the Class I market regardless of the individual handler's use of the milk."

(v) Relevant excerpts from article by Assistant General Counsel, USDA, entitled "The Pricing of Milk Under Federal Marketing Orders," 26 G. W. Law Review 180 (1958):

"The entire supply of milk which is approved by the health authorities for fluid use in a particular marketing area is fungible and homogenous. *There is no discernable basis for selecting out of the approved supply one producer's milk rather than that of another for sale on the fluid market*, and also a particular producer's milk cannot be distinguished in a milk plant from that of another. All of the milk approved by the health authorities for the fluid use in a particular marketing area is available for disposition on the fluid milk market. A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and distributors in the milkshed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor."

APPENDIX E

RELEVANT FINDINGS OF SECRETARY, ETC., RE JUSTIFICATION FOR PREFERENTIAL BASES OR FARM LOCATION DIFFERENTIAL TO NEARBY

1.(a) From Barnhart's treatise, Exhibit 77A in Mass.–R.I. promulgation hearing, filed in *Allen* and *Cranston* cases:

"I. Establishment of Bases.
C. For special classes of producers.
1. Nearby producers.

Effective March 16, 1935, an administrative change of considerable significance took place in the percentage applied in the establishment of near-by producers' bases. Before this date producers whose farms were located within 35 miles of the State House had been assigned bases equal to 85 percent of their average daily deliveries in September, October, and November, 1933, or 85 percent of their average daily deliveries for the entire calendar year 1933, whichever amount was greater. But by the middle of March 1935, a large proportion of small handlers buying Massachusetts milk were not complying with the license. *So, as a concession to win the cooperation of the Massachusetts Milk Control Board in enforcing, or trying to enforce, the terms of the federal license on intrastate handlers,* the cooperative associations agreed to allow to producers whose farms were located within 40 miles of the State House bases equal to 100 percent of the higher figure yielded by the two alternatives mentioned above. These bases became effective March 16, 1935. *Less than five percent of the producers in the market were within the 40-mile zone.*[12] Apparently this was the first appearance of the 40-mile zone as a definite working concept in the market regulation, although it did not appear in the official language until Order No. 4 became effective." (Feb. 9, 1936). [Footnote omitted.]

(b) Relevant excerpts from testimony of Administrator Davis, AAA, in 1935 Congressional hearings re discrepancies in AAA objectives under Act and market regulations, Feb. 26, 1935:

"I want to say that any difference in the whole-milk marketing program has been due to a lack of prosecution or vehicle of enforcement, or the means of securing prompt compliance with the provisions. In the main, the whole-milk program has been aimed at two things: First, to secure a minimum price to the farmer who supplied that market, and second, the provision on some basis for equalizing it among the various classes of milk marketed in that region among the various producers, so that there would be an equal division of the high price received for the milk put on the market, and they would all share equally in caring for the surplus. * * * Milk producers have told us that, while conditions are not altogether satisfactory to them, they would be considerably worse off if Federal assistance in their markets were withdrawn." (Pg. 12 of 1935 Hearings)

(c) From findings in promulgation of first Greater Boston milk order, February 7, 1936:

"4. That the determination of uniform prices to producers and the payment of such prices through a marketwide equalization pool founded upon a base-rating plan is a fair and reasonable method of distributing to producers the proceeds of sales to handlers; that the country station, transportation, butter-fat and other differentials are proper differentials to be used in calculating such prices; that the payment of *Class 1 prices* for the bases of producers whose farms are within forty miles of Boston is a proper recognition of the economic position of such producers, *due to the greater availability of their milk for Class I use;* . . ."

(d) From findings in promulgating second Greater Boston milk order and first nearby differential, Aug. 1, 1937:

"2. That in view of the changes in economic conditions since the date of the original findings, the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for milk so delivered, without the use of a base-rating plan, but with the inclusion of special *location* differentials, is a fair and reasonable method of distributing to producers the proceeds of sales of milk to handlers;"

(e) From findings in promulgating nearby differential of New York–New Jersey milk order, 22 F.R. 4213, (1957):

". . . Several factors and considerations have been advanced in support of nearby location differentials among which are * * *, (3) *the inherent value of nearby milk to the market because of its availability and the high quality of such milk,*(4) the more intimate relation between producer and dealer, * * *."

"Cost of production is a criterion for establishing prices under an order only to the extent that it affects the supply of milk for the market. Orders do not guarantee a price equal to or exceeding the cost of production, and therefore, producers generally should not be required to pay a minority an increased return because of high production costs. Accordingly, it is concluded that factor (1) above does not provide a legitimate basis for nearby location differentials. A history of paying nearby location differentials (factor (2) above) has merit only if the historical basis for such differentials is found to be sound, and therefore, must be considered in the light of other factors.

Factors *(3) and (4) above, to the extent that they are valid, are related to the extra value of such milk to the handler who buys it rather than to producers generally and are, therefore, appropriate for consideration in connection with direct delivery differentials payable by handlers rather than out of the pool. . .*"

(f) From the Secretary's brief filed in 1937 Greater Boston hearing record, p. 94, and in *Allen* and *Cranston*:

"In the study, a sample of approximately 15 percent of the producers in the market was taken. These producers were classified as even or uneven. Even producers were defined as all those producers whose deliveries in the quarter of the year in which their daily deliveries were lowest were at least 70 percent of their deliveries in their highest quarter. It was found that only around one-fifth of the producers in the market could be called even under this definition. *These even producers were scattered throughout the milkshed so that, for the most part, their evenness was completely offset by the irregularity of their neighbors.*"

(g) From the testimony in the 1951 Greater Boston hearings, 16 F.R. 9250,

Testimony of Clifton Whitney:

"The Witness: . . .

The question raised is how long should order No. 4 be the means for perpetuating special differentials to nearby producers. We feel that the time has come for termination of these special location differentials under the minimum price provisions of the Boston order.

During the past decade, the number of producers within the 40-mile zone has declined more than half even with the 46 cent subsidy paid by more distant producers. Alternative opportunities and the continued growth of cities in the geographical area have been among the principal factors responsible for this change. It is inevitable that land in this area continues to become more valuable for other uses than dairy farming. Capital invested in other enterprises in this area yields greater returns than from dairy farming.

As a result of these economic developments, dairy farmers close to the market are being outbid for their land and capital. They, in turn, cite the high cost of production

as a reason for special location differentials. It is time that we remove from the Boston order the provision which encourages nearby farmers to oppose the gradual economic trends and development in this 40-mile metropolitan area at the expense of producers in Maine, New Hampshire, Vermont and part of New York State.

If these special location differentials can still be called customary it is primarily because the Boston milk order has been the instrument which has preserved them.

One of the common arguments advanced as to why nearby producers should receive a special premium for their milk over and above the premium reflected by freight advantage, is that these producers produce more evenly than producers more distant from the market. We contend that evenness of production provides no justification for establishing location differentials. For the sake of the record, however, let us examine some facts on this question of even production. The Market Administrator's monthly statements show the following information for 1950:

	Total Receipts of Milk (Thousands of Lbs.)	Receipts from Producers Over 80 Miles from Boston (Thousands of Lbs.)	% of Total
June	166,995	154,353	92.4
November	98,152	90,695	92.4

This comparison shows that receipts from producers whose farms are located more than 80 miles from Boston shipped exactly the same proportion of the total receipts for the market as a whole in June as they did in November – namely 92.4%. This would indicate that there is little justification to be found in these figures for penalizing more distant producers with a deduction from the pool called "Location differentials" for nearby producers.

Next, let us examine a comparison of the daily average deliveries per producer during the months of highest and lowest productions this past year, by areas, according to their distance from the Boston market.

I would like to offer this as an exhibit.

Examiner Rogers: Give me the title of the document.

The Witness: The title is "Comparison, of Daily Average Deliveries Per Producer During the Months of Highest and Lowest Production in 1950, by areas, according to distance from Boston" . . .

(The document marked Exhibit No. 20 for identification, submitted by Witness Whitney, was received in evidence.)"

Portion of Exhibit No. 20

Introduced by Mr. Whitney

COMPARISON OF DAILY AVERAGE DELIVERIES PER PRODUCER DURING THE MONTHS OF HIGHEST AND LOWEST PRODUCTION IN 1950, BY AREAS, ACCORDING TO DISTANCE FROM BOSTON

	High Month (1)	Low Month (2)	Difference
Within 40 miles	490	390	100
41–80 miles	310	205	105
Zones 11–15	318	228	90
Zones 16–17	348	258	90
Zones 18	338	266	72
Zones 19	352	232	120
Zones 20	356	245	111
Zones 21	328	237	71

* * *

"The Witness: It can be seen from this table that producers within the 40-mile zone produce 100 pounds more milk each day in the month of high production than they do in the month of low production, and that producers within the 41

to 80 mile zone produce 105 pounds more milk each day in the month of high production than they do in the month of low production. In contrast, producers from the 11th to the 18th zones produce on an average 90 pounds per day or less in the month of highest production over the month of lowest production. In fact, the average producer from the 11th through the 22d zones inclusive produces less pounds of surplus milk in the months of high production compared with the month of low production than do producers within the 40-mile and 41 to 80 mile areas."

". . . We contend that the pattern of seasonal pricing provided in the Class I pricing provisions of the order has provided encouragement for more even production. Any further encouragement to changes in the producers seasonal production patterns should be provided in this same section. This method compensates all producers equally, and permits each producer to determine his individual production pattern on an equal footing.

If a producer can command a premium for his milk due to quality, nearness to the market or any other reason, he can still command it under the minimum price provisions of the proposed order. If that extra quality or service rendered by a producer has a real value to the handler of that milk, then the handler should pay for it and not the producer on the outside of some arbitrary line.

The assertion is made that producers near a market have the alternative of delivering their own milk to consumers and that somehow or other this opportunity justifies their receiving a special slice from the total pool payments in addition to the differences in freight. This thinking seems particularly unjustified in case of producers living from 41 to 80 miles from the market. It's a long haul for bottled milk in addition to the fact that if they are interested in the retailing of milk there are sizeable cities and towns much closer to them.

With regard to those producers living close enough to the Boston marketing area who wish to engage in retail

distribution following the removal of locations differentials, let them do so. They will have substantial investments to make in pasteurization and other plant equipment; delivery trucks; and bottles. They will need additional labor of various skills. Let them do it. We believe any loss of Class I sales will be more than offset by ridding ourselves of these special location differentials in excess of a quarter of a million dollars annually.

Times have changed. Raw milk has been replaced with pasteurized milk. Deliverymen on milk routes have become unionized. Transportation facilities have been improved. Milk quality has been improved. No provisions in the order provide that we should follow the customary practices practices of 15 or 20 years ago with regard to these factors which influence the pricing of milk. No more is there reason for maintaining these out-dated special location differentials supposed to represent values which no longer exist." (R. 716-721, Mass.–R.I. hearings)

From the testimony of Chester Smith, economist:

". . . I am also convinced, . . . that this section 9(e) of the Boston Order has no economic justification; that it is becoming worse as it has since January 1, 1950, when it now becomes the keystone of the arch which supports similar location differentials in three other Federal Orders, Worcester, Springfield and Lowell-Lawrence, the whole system in general, it seems to me, is not much more or less in effect than the sharp and clear economic trade barrier which starts at a radius of 80 miles of Boston at that point there is a hurdle; this is a fence 23¢ high, and as you move in and get to a radius of 40 miles there is another fence on top of that of an additional 23¢. If that 46¢ and 23¢ respectively are justifications for more even production, then certainly geographic farm location is certainly a very, very crude testimony of where they should be applied.

There is specific authorization in the Marketing Act for plans and techniques generally known as the base rating

plan, but as the law says based on marketing during a representative period of time. . . .

If the technique of a particular payment came out of the pool, out of the value of all members, all producers is justified, and I think it may be, as an inducement for more even production, then any producer no matter where located in the milkshed should have such opportunity to earn that premium as any other producer. I venture to say that an analysis of the record of say 5,000 producers, up country producers, would reveal at least several hundred. I am sure they would reveal many more producers located in the distant zones who as individuals have more even production than these particular producers in the 40 mile zone and the 80 mile zone who are now getting back those premiums just because their farm is located there.

It is true in general the whole group has evener production than the milkshed as a whole, but I have looked and I have listed lots of individual farm production patterns seasonality and know that there is a wide range even in a small locality, so that within this 40 and 80 mile zone, while the production is evener than for the milkshed as a whole, there are no doubt numerous producers who are just as uneven as the most uneven of up country producers, and conversely there are no doubt many up country producers who are just as even as the group within 40 miles and 80 miles, as a whole.

As one example, Mr. Montgomery, a producer of Randolph, Vermont testified up in Burlington that he produces milk almost exactly evenly on his farm the year round. He is within the neighborhood of 150 and 160 miles from Boston. No doubt there are many others like him, and if there is justification for an evenness of production incentive of that type, then it seems to me it is quite unfair if all producers in the milkshed do not have an opportunity to earn it.

That certainly would be a much more scientific basis than the present plan. I don't want to take up time by

laboring that point any further because that is not precisely the proposal. All I would say is for organizations who take positions in hearings here, characterizing or indicating a conclusion from presumed knowledge that the operations of other organizations are inefficient and certain changes ought to be made, I cite specifically the conclusion by one witness that it is a known fact that Milton Cooperative, for example, is inefficient to the extent of keeping a feeder plant system in operation and it ought to close some and concentrate their milk in one plant, I will say that to have to subsidize these producers in the 40 mile zone and 80 mile zone is certainly an indication that we are keeping even, efficient production in this milk shed. And the sooner we eliminate that drag on the rest of the producers, I think the more economic justice we will have for all producers in the market." (R. 720-30)

(h) From findings of Secretary, 29 F.R. 11205, Aug. 4, 1964, re incorporation of base plans into New England orders:

"(c) No provision should be made in the New England orders for a 'base-excess' plan of distributing producer returns. A cooperative association in the Southeastern New England market proposed that such a plan, which would provide for a system of Class I bases for all producers presently shipping to the New England markets, be incorporated in the New England orders. Proponent contended that the present method of pricing milk under these orders does not provide sufficient incentive for producers to adjust their production to the Class I utilization of milk in the market.

The Agricultural Marketing Agreement Act of 1937, as amended, authorizes the inclusion of base plans in Federal orders. Such plans have been incorporated in a number of Federal orders, *but only for the statutory purpose of minimizing seasonal fluctuations in milk production.* The objective of the type of base plan proposed, *i.e.*, the reduction of aggregate deliveries of milk by producers to pool plants in relation to the market's fluid needs

irrespective of price, would supplant the function which is intended under the Act to be performed by prices established at the levels required by the Act. Prices under milk orders must be established at levels which will tend to equate demand and supply for the market, insure a sufficient supply of pure and wholesome milk, and be in the public interest. Order pricing is intended to operate under conditions where milk supplies will remain reasonably free to respond to changing price conditions. Under a base plan of the type proposed, total production would be influenced greatly by the impact of the base plan rather than by the level of prices provided under the order and would be in conflict with the price criteria of the Act. The proposal therefore is denied."

(i) From the findings of the Secretary in promulgating seasonal incentive plan in Connecticut order, Mass.–R.I. order, and N.Y.–N.J. order, 32 F.R. 5288, March 29, 1967:

"Seasonal adjustments should be made in the blend price computations under each of these orders. The months in which adjustments are made should be identical under all orders. The adjustment rates should be as follows under the New York–New Jersey and Massachusetts–Rhode Island orders: Deductions from the pool fund per 100 pounds of pool milk in the respective month – March, 10 cents; April, 20 cents; May and June, 30 cents. Payments through the pool fund (percentage of the total money accumulated from the aforesaid deductions) – August, 25 percent; September and October, each 30 percent; November, the remainder plus all accrued interest. The adjustments under the Connecticut order should be the same except that deduction rates should be 10 cents greater than the deduction rates for New York–New Jersey and for Massachusetts–Rhode Island orders.

This arrangement of seasonal incentive payments is designed to give financial rewards to farmers who are producing milk when it is needed most. The incentives proposed herein are intended to encourage the adjustment of pool milk supplies for the three markets combined."

(j) From testimony of James D. Lee, Economist for NEMPA, during 1963 Mass.–R.I. hearings:

CROSS EXAMINATION BY MR. TIPTON:

Q. If there were producers up country that had just as even production as in the nearby area, then should they receive some type of differential? Does the nearby differential indicate – necessarily compensate them for the evenness of their production? A. No, it does not, and that could be compensated for only under a base rating which we do not have.

Q. Then would it not appear more equitable to have some type of a basis that would compensate all producers whether they are nearby or whether they are most distant if they have the same type of production that you determine is desirable? A. I didn't testify against the desirability of having a base rating plan.

Q. No, sir, it is not in that connection. You did testify to the effect that nearby producers bdcause they had more evenness are compensateu, nearby farm location differential. However, I am asking you in relation to producers up country which had even production also, should they not be compensated on the same basis then? A. They should be if the order is providing a base rating plan, which they do not."

* * *

"Q. Well, do you think that the handlers paid that because this milk had some additional value to them as compared with uncountry milk, or was there some other reason? A. I have already explained why the producers received the higher prices on account of supplying handlers who did have a larger share of the fluid milk market at the time.

Q. Was it because the milk from the nearby area had more value to them? A. I didn't say that.

Q. I am asking you. A. I don't wish to get into controversial milk quality or things of that kind.

Q. If the milk didn't have additional value to them then why would not a handler go to an alternative source and buy the milk? A. Some did. I don't know. I merely say the facts are that the nearby producers were determined by survey to have received those higher prices.

Q. But you don't know why? A. I offered the possible explanation, yes, that they were supplying handlers who had a larger share of the milk market.

Q. I will ask the question again in another sense and see if we can get the answer.

Assume for the moment if you will that there is not a federal regulation in effect and that there is not a state regulation in effect, it is completedly free. The handler located in Boston has received milk from producers that are within forty miles of the State House in Boston. He has also received milk from producers that are 200 miles from Boston. He has this milk now in his plant in the city. Is it exactly the same quality, he knows what portions of the milk came from the nearby or from the producers of within forty miles and he knows what milk came from the up country sources and where it came from. Will he pay any difference for these two volumes of milk?

Mr. Hall: I think that question is objectionable on the grounds that it calls for a great deal of speculation. Maybe Mr. Lee can speculate on all these hypothetical questions that Mr. Tipton has included in his question.

Examiner Holstein: No, I think that is a fair question, Mr. Hall. Mr. Tipton wants to know why a handler should pay more for milk which comes from forty miles from his plant than he does for milk which comes 200 miles from his plant, all other things being equal . . .

The Witness: It is conceivable that the handler had an arrangement with the cooperative association which we will assume the nearby producers belonged to and that in the absence of federal regulations would pay more than

he might be able to procure fluid milk of the same quality from some up country supplier that might wish to supply the milk at a discount.

By Mr. Tipton:

Q. Now assume that we are at the end of the period of this contract or the agreement with the producer and association and that is it is time to renegotiate this. Would your answer be the same, that he would renegotiate the price possibly higher? A. I don't know. I don't know whether he would or not.

Q. In Table II, that is in this exhibit you show some computations relating to the value of farm location differentials in 1962. In this table under Worcester you show that producers in the nearby area contribute toward the nearby farm location differential amount of 34 cents per 4000 hundredweight. However if your proposal were adopted that the three markets of Boston, Worcester and Springfield were adopted, that the contributions of the nearby producers under Worcester would decrease from 34 cents to 9 cents, is that correct? A. I have stated the amount in my testimony but –

Examiner Holstein: That is what is shown on here.

By Mr. Tipton:

Q. Then this would have the effect of causing up country producers under the Boston market to pay an increased proportion of the nearby farm location differentials, is that correct? A. Yes, it would.

Q. Do you represent producers in the up country area? A. Yes.

Q. Do you represent producers in the nearby area? A. Yes.

Q. About what proportion in each of the areas? A. I don't know.

Q. Do you have any idea? A. No.

Q. On page 14 in the first full paragraph which is an excerpt from Exhibit 77-B there are stated several reasons

as to why the differential of 46 cents was apparently justified or paid or what have you prior to federal regulations. Could you identify now what items of those, if any, would cause a differential to be paid under present conditions without federal regulations? A. I think the point of Professor Bell in his second sentence went on to say, "In addition it is recognized by sellers more remote from the market that sellers near to market must received an additional amount commensurate with their current opportunities of sales which are naturally economic to their location."

Q. Well, I had specific reference to the first sentence and the items listed in the first sentence. A. I think we will concede that those are similar. I will agree that they are similar.

Q. That those are similar to what? A. You asked me to name any one of those factors which today would be a factor for a difference which is in excess of them and I say not one of them. It is the second sentence which contains the germ of Professor Bell's thought in that paragraph.

Q. So none of the items in the first sentence would constitute a reason for justification of the 46 cent differential, is that what you are saying?

Examiner Holstein: I think he said it once, Mr. Lee, didn't you?

The Witness: Yes.

Mr. Tipton: I didn't understand he had said it. He said similar and I didn't follow what he meant by similar.

The Witness: I would not want to speculate on exactly what he had in mind on other charges but –

Examiner Holstein: No, that is not Mr. Tipton's question. Mr. Tipton's question is which one of these items in the first sentence, first full paragraph on page 14, would have a reason for justification to day for the differential.

The Witness: I have answered that. The justification for a location differential today is the same as it was – turning to nearby producers, would exceed these –

Examiner Holstein: Mr. Tipton is entitled to an answer to that question. Which ones of those items, they are specifically set down here – one, freight, two company assembling container services, three, refrigeration and so forth – are any of those valid today?

Is that what you meant?

Mr. Tipton: Are any one of those a reason for justification of the 46 cent transportation differential?

The Witness: No.

Examiner Holstein: That question is answered, we can move on."

(k) Comparison of findings of Secretary in promulgating nearby farm location differential in milk orders:

SOUTHEASTERN NEW ENGLAND MILK ORDER

Handling of Milk in Southeastern New England Marketing Area 23 F.R. 8238 (1958)

Historically, dairy farmers in the States of Massachusetts, Rhode Island and Connecticut, because of their location with reference to the large population concentrations of New England have disposed of a substantially larger percentage of their production for fluid uses than have dairy farmers in the upcountry area. Hence nearby producers have been able to realize a price higher in relation to more distant producers than can be accounted for by the advantage in the cost of transportation to market. Under the marketwide pooling herein proposed and without some adjustment mechanism the nearby producer, notwithstanding, would be paid on the basis of the average utilization of all milk on the milkshed rather than according to the utilization of his milk. Under a regulated market, however, he obtains the benefit of an established Class I price which may be higher than in the absence of regulation, and has assurance that his milk will not be displaced by cheap, unregulated milk from more distant sources. The distant producer also benefits from an established Class I price, and by the fact that he gains a larger share of the fluid market than is likely without marketwide equalization.

The use of a nearby differential will return to nearby producers a somewhat greater share of the Class I price than they would otherwise obtain through marketwide pooling. Moreover such a differential will tend to provide returns to both nearby and upcountry producers more nearly in line with their prospective returns without marketwide equalization.

The scheme of nearby farm location differentials and the amount thereof is identical with that employed in adjacent Federal order markets.

NEW YORK–NEW JERSEY ORDER

Milk in New York Metropolitan Marketing Area 22 F.R. 4213 (1957)

Historically, the percentage of the milk produced nearest to metropolitan New York–New Jersey which is used for fluid purposes is higher than the percentage of more distant production which is used in fluid form. Over 92 percent of the milk received in 1956 at pool plants within 125 miles was for fluid use. Nearby producers have been able to get a price higher in relation to more distant producers than can be accounted for by the advantage in the cost of transportation to market. When milk is pooled on a marketwide basis, the nearby producer is paid on the basis of the average utilization of all milk in the milkshed rather than according to the utilization of his milk. Together with equalization, however, he obtains the benefit of an established Class I price which may be higher than in the absence of regulation, and is protected to some extent from the loss of a market because of competition of cheap milk from more distant sources. The distant producer also benefits from an established Class I price, and in addition gains a larger share of the fluid market than is likely without equalization.

In order to provide benefits of more nearly equal value both to nearby and distant producers, some form of special location differential is needed, the effect of which is to give the nearby producer a somewhat greater share of the high-priced Class I-A milk than he would obtain through marketwide pooling without such a differential, but a smaller share than he would be expected to obtain under an order with handler pools.

CONNECTICUT MILK ORDER

Handling of Milk in Connecticut; New York–New Jersey; and Springfield, Mass., Marketing Areas 24 F.R. 1049, 1063 (1959)

The Federal order markets in New England and the New York–New Jersey market provide for similar differentials to their procedures with nearby farms. The major portion of the area herein proposed as the nearby differential area for Connecticut producers overlaps or is adjacent to the nearby differential areas of other Federally-regulated markets competing for supply.

Milk received from the nearby area has long represented the major part of the total Connecticut supply. The differentials adopted recognize the higher percentage of the milk near to the market than of milk in the more distant zones which customarily has been used for fluid purposes. Nearby producers have been able to obtain a price higher, in relation to more distant producers, than can be accounted for by the advantage in the cost of transportation to market. This historical pattern of pricing has been typical in the markets of this region, and market differentials of this type have been adopted in the nearby regulated markets. The differentials adopted will reflect more representative values with respect to the milk of both nearby and distant producers since the nearby producer will share in the higher-priced Class I market to an extent somewhat greater than otherwise would be the case under market-wide pooling.

MASSACHUSETTS–RHODE ISLAND MILK ORDER

Milk in Certain New England Marketing Areas 29 F.R. 11213 (1964)

The differentials were adopted to reflect in the pricing structure of the orders historical price relationships by location which prevailed in these markets. It was found that customarily somewhat higher values, above those which normally reflected transportation costs, attached to milk produced near the principal consumption centers as compared to the market value of milk produced in the more distant areas of the milkshed.

While considerable testimony in support of removal of the provisions was received, it was not established that the farm location differential provisions *are resulting in unstable or disruptive marketing conditions which warrant their* deletion from the orders at this time.

CONNECTICUT MILK ORDER

Milk in Greater Boston, Mass.; Southeastern New England: Springfield, Mass.; Worcester, Mass.; and Connecticut Marketing Areas 25 F.R. 7833 (1960)

As stated in the Secretary's decision of February 9, 1959 (24 F.R. 1049), the present provisions were established in recognition of the higher Class I utilization, and higher returns that nearby producers had customarily received over more distant producers. In addition, the use of a nearby differential was expected to implement price alignments with adjacent Federal order markets and thus assure Connecticut handlers of the ability to compete in the purchase of milk on reasonable terms with dealers in adjacent markets.

(l) From the findings of Secretary, 29 F.R. 11205, Aug. 4, 1964, re rejection of individual-handler pools for New England orders:

"The major readjustment of the entire marketing structure in New England which undoubtedly would accompany the institution of individual-handler pooling would add to marketing costs and thus be uneconomical and undesirable. The differences in producer prices which could be expected to ensue from such method of pooling would not promote the objective of more uniform alignment of prices to producers which, as elsewhere described in the decision, is important to orderly marketing in New England. The application of marketwide pooling under a merged order will promote market stability by insuring that all producers supplying the Massachusetts–Rhode Island market will share on a uniform basis the Class I and Class II utilization in the entire market and thus assist to permit the assembly of supplies in an economical manner for available outlets. Accordingly, the proposals for individual-handler pooling are denied."

(m) From testimony of Dr. Stuart Johnson, C.M.P.A. economist, during 1956 N.Y.–N.J. administrative hearings, re reasons for higher price statistics for nearby milk:

CROSS EXAMINATION BY MR. WINTON:

"Q. Do you know how much milk is being sold at those prices, or whether the producers regulated by OMI aren't losing markets? A. I have no comment on that. Dr. Waller covered that on need for market.

Q. You recognize there is a difference between fixing a price and marketing milk at that price, don't you? A. I recognize that difference, Mr. Winton.

Q. And you are not going to testify how successfully milk is being marketed at the prices fixed by OMI though you cite price fixed by OMI? A. I am interested in prices received by farmers.

Q. And not how many of them receive it? A. And how many receive it.

Q. Then you must be interested in whether they are able to market their milk, the thing which you said you weren't interested in. A. I think most farmers in Northern New Jersey do have a market. I haven't heard of any of them dumping their milk or feeding it to calves because they had no market whatsoever.

Q. You have read about them switching under Order 27, haven't you? A. I have general knowledge that there have been transfers from one market outlet to another.

Q. No, from OMI regulation to Order 27. You know that, don't you? There has been an increasing number going to Order 27 because they didn't have another market. A. It depends on what time period you choose, but you can find periods of recent years when shifts took place in that direction.

Q. As an expert in the milk business, don't you know, and isn't it something that would occur to you, that when differences exist between two markets, they are often the result of manipulation of health approval? . . .

THE WITNESS: I wouldn't use the word "manipulation" because it has an inference that Health Departments were doing something wrong. But I would say that price differences have been associated with Health Department requirements in some instances.

Q. Assuming that that was the responsible policy of the officials of the State of New Jersey, would you say that the Secretary of Agriculture would be warranted in adopting price differences resulting from such policy as the basis for pricing milk under a Federal order? A. I don't know whether that was the policy and, if so, for how long, and I have no comment.

Q. Do you think that irrespective of what the health practice of regulating milk was, for purposes other than health regulations, the resulting price situation should be perpetuated by Federal order?

EXAMINER HYDE: He has indicated he is not going to talk about these health matters, Mr. Winton.

Q. You are aware, are you not, you are from Connecticut, that health practices have also been utilized in Connecticut, similarly, and that this is something which an economist should be aware of?

MR. DOLAN: I object as immaterial . . . .

EXAMINER HYDE: The witness has indicated that he is not going to talk about health matters, Mr. Winton, and you have asked him five or six times. In my opinion, that is ample to show his attitude. Pass to something else."

* * *

"Q. Did you give the testimony which I have marked off here? A. I did."

* * *

"MR. WINTON: 'Mr. Andresen: In other words, at any time a farmer can meet the sanitary requirements of Connecticut he can ship milk or cream into the area?

> "Mr. Johnson. With that proviso of meeting the sanitary requirements and obtaining approval, the answer is yes.'

By Mr. Winton:

Q. Wasn't it clear to you that there was something more to getting into a market than meeting the sanitary requirements? You also had to have an authority that was willing to approve you, even if you met the sanitary requirements?"

* * *

"MR. LENT: The witness has testified to a locational differential for the separate New Jersey order, which is higher than the locational differential in the present New York order to producers across the line in Orange County. He has said that the justification for that is an historical record of higher prices on the New Jersey side of the line.

Mr. Winton is trying to show that that justification was based on a restricted, competitive situation, caused by the Health Department of New Jersey activities. It seems to me it is directly connected with his direct testimony, and

while this question is more important to the proposition of the requirement of Jersey Health Department approval for admission to the New Jersey order pool, it nevertheless has pertinence to the amount of the location differential as well. . . .

MR. WINTON: In that connection, the refusal of the witness to discuss the underlying facts which an economist should take into effect when considering the reasons for the prices, I think should give rise to the inference that the difference is due entirely to the reasons which the witness refuses to discuss."

* * *

"Q. You refer on page 25 of Exhibit 34, to a letter of Dr. Vial pointing out the existence of premiums. In that same letter, was it not pointed out that the premiums did not exist in Orange County, New York, in anywhere near the amount shown for Sussex County? A. That is correct, Mr. Winton.

Q. And Orange County and Sussex County are situated relatively the same distance from the market, are they not? A. I think they are about the same.

Q. In your opinion, what is the difference between Orange and Sussex County due to? A. I don't know exactly, Mr. Winton, and I don't know whether I should speculate on a matter on which I do not have detailed knowledge.

Q. The next paragraph on page 25 says, "Whatever the reason, whether seasonally uniform production, a schedule of transportation differentials under Order 27, which underprices nearby milk, or a more marketable product than more distant milk, the fact is clear that historically the nearby producers who likely would be included in a North Jersey pool have received substantial premiums over Order 27 prices, which prices include the Order 27 location differential."

There you are referring to New Jersey producers, aren't you? A. Primarily so, Mr. Winton.

Q. Secondly, your conclusion in this paragraph is you don't know the reason why the New Jersey producers have gotten more money than other producers similarly situated, because you say whatever the reason, and you don't state what the reason is, is that correct? A. Well, I state whatever the reason, and then I give three reasons that I think are pertinent in making possible the premium.

Q. The first two you have already admitted have nothing to do with location differentials as you propose them under Order 90, that is, seasonally uniform production, and under-pricing transportation differentials. A. I have said they have little to do with it, yes.

Q. Now we get, then, to what we have been getting to gradually, the more marketable product.

Do you say that North Jersey milk is more marketable than Orange County milk or other milk that is further away in the milkshed? A. Do you have a question?

Q. Yes. I say, do you say that? A. Yes, I do.

Q. And by more marketable, do you mean marketable at a higher price? A. That is what I mean.

Q. Then does that mean anything other than that historically New Jersey producers have received somewhat more than other producers? A. The two go along together, Mr. Winton.

Q. They are the same thing, aren't they? A. Well, they are not identities, but because of greater marketability the price is higher.

Q. Would one of the factors of marketability be that the Department of Health of the State of New Jersey has restricted outside milk coming into the state so that the nearby milk occupies the Class I market to a greater degree? Is that one of the factors? That is, of marketability? A. It may or may not have been, Mr. Winton. I see we are back on the health question again. . . .

Q. Did it come to your attention that surveys by the New Jersey Health Department, published in its official

bulletin, showed that milk produced outside the State of New Jersey and approved for New Jersey had less bacteria than milk produced within the State of New Jersey? I show you, in that connection, Exhibit 98. A. Exhibit 98 had not come to my attention, Mr. Winton. . . .

Q. Don't you think before you discuss the greater marketability of milk produced nearby, you should have checked either in the Department of Health of the State of New Jersey or its official publications, data showing that the nearby milk was not of as high a quality as the far away milk, because for this reason stated by the Health Department, "The comparison may be explained in part because we select and license from all available supplies situated outside our borders only those that comply with our laws, but at the same time we must live with, and by means of education improve, supplies located in New Jersey". A. A more pertinent factor, it seemed to me, Mr. Winton, was that a large number of producers were approved and many more than needed, to supply the fluid market. . . . "

"Q. Did you notice this, that the state Health Department said that, as to out of state supplies, they enforce their laws strictly, but they went on to say, "Definite health hazards must be proven before we close a man's business in the state and deprive him of a means of livelihood?"

Don't you think that is also a factor which you should consider in talking about the greater marketability of nearby milk? A. I did not read the sentence that you have pointed out to me, Mr. Winton."

* * *

"Q. As an economist, and student of milk marketing, do you think that regulation should put a higher tag on milk produced under less rigorous sanitary requirements than out of state milk? A. By a higher tag, Mr. Winton, what do you mean?

Q. The price tag. To price it higher because of the bacteria count or other quality? A. No, I do not think so, Mr. Winton."

(n) From the 1962 Report of the Federal Milk Order Study Committee (Nourse Committee) appointed by the Secretary:

"OBSTACLES TO INTER-ORDER TRANSFERS OF MILK SUPPLIES

Among the order provisions and other factors that have interfered with normal adjustment of utilization patterns and uniform producer prices through orderly transfers of milk supplies from one market order pool to another are the following: individual handler pooling, pooling requirements, assignment of other source milk to lower classes, compensatory payments, special location differentials to "nearby" producers, sanitary regulations and other institutional factors."

* * *

"*Sanitary regulations.* When the system of Federal milk orders was inaugurated, lists of plants and producers approved by the health authorities of various states and municipalities were useful as a basis for identifying the milk supplies to be priced and pooled under the orders. Thus in many instances municipal or State health authorities found themselves in a position to determine what milk supplies could be pooled under a given order. The situation has changed, however, and health authorities now have much less influence over the composition of Federal order pools than they had during the early years of the program.

The requirements for pooling make it necessary in most instances that the sources be approved by local or State milk inspection authorities. Many of the orders embrace the jurisdictional areas of more than one such agency thus limiting the opportunity of any one agency to control access to the pool. During recent years there apparently have been few instances in which sanitary inspection

agencies have attempted to restrict entry of milk supplies to the marketing area for other than valid sanitary reasons.

The Connecticut milk order pool is a noteworthy exception to this general condition of freedom from control by milk inspection agencies. The milk marketing area defined by the Connecticut order is completely within the jurisdiction of the State Commission of Agriculture and Natural Resources who administers the dairy laws of Connecticut, including the so-called "Connecticut Milkshed Law." This law among other things authorizes the Commissioner to approve new sources of milk supply only when the receipts of Connecticut handlers exceed their fluid sales by less than 10 percent in November or December or by less than 25 percent in other months.

From the viewpoint of milk producers and public authorities in Connecticut this system of regulation undoubtedly has great merit. But from the viewpoint of achieving equitable relationships among producers and handlers under the Federal orders for Connecticut and adjacent areas it constitutes an arbitrary barrier. It accounts to a considerable degree for the high Class I utilization under the Connecticut order as compared with the much lower utilization percentages for the adjacent Boston and New York-New Jersey orders.

Such extra-order control of access to market order pools should be a matter of serious concern to the Department. As suggested in the preceding discussion of Marketing Areas, one promising remedy for such outside interference with a Federal order is to so define the marketing area that it will embrace the jurisdictional districts of more than one sanitary control agency. But this remedy alone may not be adequate in all cases."

* * *

"*Individual handler pooling.*

. . . Individual handler pooling and market-wide pooling in the orders for adjacent or competing markets are incompatible for two reasons: first, because individual handler

pooling tends to cause handlers to restrict their purchases of milk and to throw a disproportionate burden of maintaining regional reserves upon neighboring market pool orders, and second, because operating cooperatives under orders with individual handler pools have an economic incentive to move their surpluses into other markets at cut prices.

Only by keeping his milk supply closely adjusted to his fluid sales can a handler under an order with individual-handler pooling place himself in an advantageous position from the standpoint of procurement. If he fails to maintain a high Class I utilization which permits him to pay attractive blended prices, he will find competitors picking off his more desirable producers. The high Class I utilization and high blended returns are, of course, beneficial to the producers who are fortunate enough to participate in them. But this system usually reacts unfavorably upon the producers whose milk is priced and pooled by other orders in the same region.

Practically without exception, individual handler pools have failed to absorb their proportionate shares of the reserve supplies of market milk in the regional areas where they are used. A comparison of Class I percentages for the 14 handler pool orders and the market pool orders hearest to each of them for the year 1960 reveals the following: the simple average of Class I percentages for the handler pool orders was 84.5 percent; the comparable average for 25 adjacent market pool orders was 67.3 percent.

It is clear that individual handler pooling has a strong tendency to prevent desirable utilization adjustments among Federal order markets and to maintain unwarranted disparities in the blended producer prices established by the two types of orders.

As indicated previously, individual handler pooling in markets where substantial quantities of milk are handled by cooperative associations may generate unfair competition not only in the markets to which this system applies,

but also in others.[3] Since cooperatives are allowed to pay members the net proceeds of their operations, they have a strong incentive under individual handler pooling to dispose of surpluses in outlets that will yield more than the surplus value. This usually means sales for fluid use in outside markets at cut prices." [Foonote omitted]

* * *

Substantial and continuing differences in utilization and in blended producer prices under orders for adjacent markets should be recognized as evidence of discrimination which inevitably leads to disruptive competition."

* * *

"*Special location differentials to "nearby" producers. . .* In fact, the specified rates of nearby differentials are the same under all Federal orders for New England markets (46 cents in the nearby area and 23 cents in the intermediate area) even though the percentages of pooled milk used in Class I differ widely. In 1960, the range of Class I percentages was from 58 percent in Boston to 79 percent in Connecticut. . . .

Under the Boston order, nearby differentials are paid on only about 6 percent of the pooled milk and the uniform price is depressed less than 3 cents per hundredweight by these payments. Under the New York–New Jersey order, slightly less than 20 percent of the pooled milk qualifies for the nearby differentials and the uniform price is depressed about 6 cents per hundredweight.

On the other hand, under the Federal orders for Worcester, Springfield, Southeast New England and Connecticut, nearby differentials are paid on 65 percent to more than 90 percent of the pooled milk and uniform prices are depressed from about 30 cents to more than 40 cents per hundredweight. In 1960, 90 percent of the pooled milk under the Connecticut order qualified for the 46 cent differential, and 3 percent for the 23 cent differential. The total amount paid in nearby location differentials was equivalent to 43 cents per hundred pounds of all pooled

milk and the uniform price to producers outside the differential zones was depressed to that extent. Thus, the attraction of the high blended price resulting from a high Class I utilization under the order is substantially reduced with respect to producers in the outlying areas.

In circumstances where a high percentage of milk qualifies for the nearby differentials the producers who participate derive little net gain except for the pool tightening effect of the lower blended returns in the outer zones. Thus, order provisions for nearby differentials of this magnitude can and do effectively limit access to the pools. . . .

The uniform prices determined under several of the orders are significantly depressed by payment of special differentials out of pool funds to "nearby" producers. In a few instances, a high percentage of the milk in the market order pool qualifies for such payments with the result that returns to producers in the outer zones are substantially reduced. Aside from the equities involved internally, such large special payments constitute a barrier to the entry of additional supplies from adjacent production areas and tend to prevent desirable intermarket adjustments. The Committee suggests that the justification for such differentials be reconsidered, especially in the case of areas with high fluid utilization, with particular attention to the impact of these payments upon producers who are ineligible to participate. . . ."

(o) From article entitled, "The Pricing of Milk Under Federal Orders", by Assistant General Counsel, USDA, 26 Geo. Wash. Law Review 180 (1958):

"Although there is a pronounced seasonal variation in the production of milk, milk consumption is about the same in all months subject, however, to daily fluctuation which requires the industry to carry an operating reserve of approximately 20 percent." (U.S. Department of Agriculture, Marketing Div., 1954 Yearbook of Agriculture, 477).

(p) From the Report of the Pitcher Committee, a special joint legislative committee appointed by the New York State Legislature on March 10, 1932:

"The fact that the larger distributors find it necessary to carry large quantities of surplus milk while the smaller distributors do not, leads to price-cutting and other forms of destructive competition, especially when the surplus is abnormally large. The small distributor can contract for his minimum requirements and depend upon emergency purchases when threatened with a shortage. The larger distributors can not do this since the same percentage deficiency in volume would involve quantities too great to be obtained on short notice. The result of this situation is that the smaller distributors who take no responsibility for the surplus, by purchasing their milk on the basis of the blended returns by the larger organizations, are in a position to undersell the larger distributors in the cities."

(q) From the testimony of Dr. John D. Black during the 1956 N.Y.–N.J. administrative hearings:

"Q. Now let me press the feeling of the Jersey groups, I think, by saying that we believe that the New Jersey market should carry the surplus associated with its fluid sales, in some way. We believe that is true.

We do believe, however, that in this surplus that you mention is surplus that should be carried by still other markets, and we would refer particularly to the secondary markets in New York State. We have heard that there is surplus in Order 27 (New York) that rightfully belongs to Connecticut and Philadelphia. Our position is that we should take, and are prepared to take, that part associated with our markets, but that we should not necessarily assume a portion of surpluses rightfully belonging to other markets.

I have made a statement here, and I would just ask you, then, if you feel there is merit in our position. A. I think there is merit in your position so far as the Philadelphia market not carrying its share of the surplus, and

the Connecticut market, and any other markets, and maybe some upstate markets that are so managing their affairs that they are not shouldering their fair share of it. To the extent that getting them to share their fair share of that will help out in the Northern New Jersey situation, that is all to the good.

The question of the extent to which it becomes necessary to reach out and include these upstate markets into this in order to achieve what you are talking about, of course, is a matter that we discussed this morning. A system of Federal orders such as we have in Massachusetts, to the extent that the Federal Government operating with its – how many markets does it now have under orders – to the extent that it isn't handling relations between the Philadelphia order – . . . – and the New York order in such a way that surplus is not properly shared between them, that is a criticism of the administrators in Washington. I am looking right at them now."

(r) From testimony of James Lee, economist for N.E.M.P.A. and former economist with Boston Mkt. Adm., testifying in favor of nearby differential in Mass.–R.I. hearings:

CROSS EXAMINATION

By Mr. Tipton:

"Q. All right. Let me ask it another way.

Are you familiar with the amount that the Connecticut market takes out per hundredweight in order to obtain an aggregate amount of money to pay nearby farm location differentials? A. Yes. And the values and rates are set forth in table 2.

Q. In Table 2 it is shown for all producers as 45 cents, is that correct, for the period of 1962? A. Yes.

Q. And the differential is 46 cents, is that correct? A. The value per hundredweight of all of the differentials in Connecticut was 45 cents. The rate to the nearby producer was 46 cents.

Q. The rate that they received was 46 cents? A. Yes.

Q. And the amount that was deducted from all the milk in the pool was 45 cents. If the nearby farm location differentials were deleted from the Connecticut market, there would be a net loss of approximately one cent, is that correct? A. Yes.

Q. So what advantage does the nearby farm location differential give to the nearby producers other than a one cent gain in their price, anything? A. I didn't mean to imply there was any substantial advantage in that regard.

Q. Well, is there any substantial advantage in that regard? A. I said no.

Q. Oh, there is no substantial advantage? So the Connecticut nearby farm location differentials could be removed? A. No.

Q. And there would not be a substantial change in the prices that the Connecticut producers would receive, is that correct? A. A substantial change to nearby Connecticut producers?

Q. Yes. A. That is correct.

Q. If there would not be a change we recognize that there would be a one cent change approximately. If this would be the only change, why would you, or would you have an objection to the deletion of the nearby farm location differentials in the Connecticut market? A. I would be in favor of keeping the differential in the Connecticut market on the basis of principal as in all of the other markets. There happen to be more nearby producers in Connecticut which affects the rate substantially but the principal would remain the same whether it is a Connecticut market or a Boston market that we are talking about.

Q. Just so we understand, the deletion of the nearby farm location differential would not affect the Connecticut price to nearby producers of a very substantial amount, and by that I mean one or two or three or four cents, something like this? A. The rate makes that obvious.

Q. Continuing that line just a moment then, would you anticipate that if the nearby farm location differential was removed, that there would be an increase of supplies in milk into the Connecticut market? A. No."

(s) Notice of termination of N.Y.–N.J. nearby farm location differential, 32 F.R. 2807, February 11, 1967, for failure to effectuate purpose of Act, after decision in *Blair*:

PART 1002–MILK IN NEW YORK-NEW JERSEY MARKETING AREA

Order Terminating Certain Provisions

Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), and of the order regulating the handling of milk in the New York–New Jersey marketing area (7 CFR Part 1002), it is hereby found and determined that:

(a) The following provisions of the order having been declared illegal by a court of competent jurisdiction cannot be enforced and, therefore, no longer tend to effectuate the declared policy of the Act.

1. In paragraph (b) of § 1002.42 the provision "the nearby differential area or in" as it appears in the first sentence thereof.

2. All of subparagraph (b)(7) of § 1002.47.

3. In paragraph (e) of § 1002.65 the first sentece thereof, and

4. All of paragraph (b) of § 1002.71.

(b) Notice of proposed rule making, public procedure thereon, and 30 days notice of the effective date hereof is impractical, unnecessary, and contrary to the public interest in that:

1. It is immediately necessary to delete these provisions from the order as promptly as possible to give effect to the decision of the Circuit Court of Appeals in Lorton Blair et al. v. Orville Freeman, decided November 18, 1966,

holding the nearby differential provisions of the order to be illegal.

2. These provisions were placed in partial suspension immediately following the Circuit Court's decision and the nearby differential monies were placed in escrow pending consideration of a possible appeal to the Supreme Court.

3. It has now been determined that the Government will not take an appeal from the Circuit Court's decision in this case.

4. Prompt deletion of these provisions by termination will allow the blend price for January and subsequent months to be computed without adjustment for the nearby differentials thereby giving full effect to the Court's decision.

Therefore, good cause exists for making this termination order effective February 11, 1967.

It is therefore ordered, That the aforesaid provisions of the order are hereby terminated.

(Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674)

Effective date: February 11, 1967.

Signed at Washington, D.C., on February 8, 1967.

GEORGE L. MEHREN,
Assistant Secretary.

(t) Excerpts from the Market Administrator's Bulletin for the N.Y.–N.J. milk order re receipt of highest milk prices in history of milk order from April, 1967 to date:

"Dairy farmers in the New York–New Jersey milk shed will get 20 cents more for every 46.5 quarts of milk for April, May and June than they did last year. Each hundredweight of Class I milk will cost handlers $5.86, up about 75 cents over the prices for last April, May and June, A. J. Pollard, market administrator, said Saturday." (News article pursuant to news release from USDA, N.Y.–N.J. marketing area, April, 1967).

* * *

"OCTOBER SAW HIGHEST NYC REGULATED PRICE

October's uniform price of $5.64 per hundredweight was the highest regulated price ever paid dairy farmers for milk deliveries to the New York City market.

It topped by three cents the record set the previous month. Prior to this year, the highest price was $5.52 in November, 1948, before the orders were expanded to include New Jersey and Upstate New York. . . ." (Vol. 27, No. 8, December, 1967 Market Administrator's Bulletin).

* * *

"SEPTEMBER PRICE TOPS RECORD SET IN AUGUST

September's uniform price broke a record set only the previous month. The $6.09 per hundredweight dairy farmers received was the highest price ever paid under an order for the New York City market, topping by 22 cents the former mark set in August.

The price was 48 cents more than was paid in September, 1967. . . ." (Vol. 28, No. 11, Sept. 1968, Bulletin).

* * *

"UNIFORM PRICE WAS AT A RECORD HIGH FOR THIRD STRAIGHT MONTH

The uniform price was at a record high for the third month in a row in October. Dairy farmers received $6.15 per hundredweight, the top price ever paid under an order for the New York City market.

October's price was six cents greater than the previous mark which was set in September and 51 cents more than was paid producers in October, 1967. . . ." (Vol. 28, No. 13, Dec. 1968 Bulletin).